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Supreme Court, U. S.
FILED
JAN 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. .....

SAMUEL H. SLOAN individually
and d/b/a SAMUEL H. SLOAN & CO.,
Petitioner,

-against-

SECURITIES & EXCHANGE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. _____

SAMUEL H. SLOAN individually and d/b/a SAMUEL H. SLOAN & CO.,

Petitioner,

-against-

SECURITIES & EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit dated May 10, 1976 which dismissed in part and affirmed in part an appeal from various orders of the United States District Court for the Southhern District of New York and to review the decisions of the United States Court of Appeals for the Second Circuit dated December 6, 1976 which denied a petition for a rehearing and a suggestion that the rehearing be en banc.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit dated May 10, 1976 is reported as *Securities & Exchange Commission v. Sloan,* 535 F. 2d 679 (2d Cir. 1976) and is included as Appendix A to this petition. The decisions of the United States Court of Appeals for the Second Circuit dated December 6, 1976

which denied a petition for rehearing and a suggestion that the rehearing be en banc are unreported and are included as Appendix B and Appendix C to this petition. There were no reported opinions by the United States District Court for the Southern District of New York.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on May 10, 1976. A petition for rehearing and a suggestion that the rehearing be en banc was denied on December 6, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The time within which to apply for a writ of certiorari to bring this proceeding before the Supreme Court for review is ninety (90) days from December 6, 1976 pursuant to 28 U.S.C. §2101(c).

QUESTIONS PRESENTED

1. Is an adjudication of contempt which resulted in the imprisonment of the petitioner and the dismissal of three appeals filed by the petitioner a non-appealable order?

2. Did the appeal from the contempt adjudication become moot when the United States District Court, at the request of the respondent, declared that the petitioner had purged his contempt and ordered his release?

3. Did the District Court err in adjudging the petitioner in contempt of court based solely upon an affidavit filed by counsel for respondent consisting of statements made "upon information and belief" without giving the petitioner the opportunity for a hearing, the opportunity for a jury trial, and the opportunity to cross-examine witnesses, at a time when the petitioner was physically incapable of appearing in court?

4. Did the district judge err in failing to recuse himself from this case on the ground that he had become embroiled

in a running controversy with the petitioner?

5. Are orders refusing to dismiss the action on various grounds including inadequate service of process, granting plaintiff a protective order as to certain interrogatories and subsequently staying all discovery proceedings until the defendant had purged his contempt, not appealable final orders?

6. Did the United States District Court for the Southern District of New York err in failing to disqualify and disbar counsel for plaintiff and to adjudge plaintiff and its counsel in contempt of court for issuing a press release discussing the entry of a preliminary injunction in this action in violation of the court's order and in violation of Disciplinary Rule 7-107 (G) as well as Ethical Consideration 7-33 of the Code of Professional Responsibility of the American Bar Association?

7. Does the Securities & Exchange Commission have the statutory authority to prosecute actions in its own behalf?

8. Is an order denying a motion to enjoin plaintiff and its counsel from harassment and annoyance of the defendant a non-appealable order?

9. Does the right asserted by the Securities & Exchange Commission in this action, which is the right to have general and continuous access to the financial records of a securities broker dealer, violate the rights guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States?

10. Are the issues presented in this petition moot by virtue of the dismissal as moot of this action by the United States District Court for the Southern District of New York on August 18, 1976 where as a collateral consequence of certain of the orders appealed from, other appeals in this and two unrelated cases have been dismissed and the petitioner has been barred for life from being associated with any broker or dealer?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Fifth Amendment, in pertinent part, provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . .

STATUTES AND RULES INVOLVED

28 U.S.C. §516 provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

At the time this action was commenced, Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78 q(a), provided:

> Every national securities exchange, member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered

> pursuant to section 15 of this title, shall make, and preserve for such periods such accounts, correspondence, memoranda, papers, books and other records, and make such reports as the Commission by its rules and regulations may proscribe as necessary or appropriate in the public interest for the protection of investors. Such accounts, correspondence, memoranda, papers, books and other reports shall be subject at any time or from time to time to such reasonable, periodic, special or other examinations by examiners or representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

At the time this action was commenced, Section 21(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78 u(e), in pertinent part, provided:

> Whenever it shall appear to the Commission that any person is engaged or is about to engage in any acts or practices which constitute violations of this title or of any rules or regulations thereunder it may in its discretion bring an action in the proper district court of the United States . . . to enjoin such acts and practices and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts and practices to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title.

At the time this action was commenced, S.E.C. Rule 17a-4, 17 C.F.R. §240.17a-4, in pertinent part, provided:

> (a) Every member, broker and dealer subject to §240.17a-3 shall preserve for a period of not less

than six years, the first two years in an easily accessible place, all records required to be made pursuant to paragraphs 1, 2, 3 and 5 of §240.17a-3.

(b) Every such member, broker and dealer shall preserve for a period of not less than three years, the first two years in an easily accessible place:

(1) All records required to be made pursuant to paragraphs 4, 6, 7, 8, 9 and 10 of §240.17a-3.

(2) All check books, bank statements, cancelled checks and cash reconciliations.

(3) All bills receivable or payable (or copies thereof), paid or unpaid, relating to the business of such member, broker or dealer, as such.

(4) Originals of all communications received and copies of all communications sent by such member, broker or dealer (including inter-office memoranda and communications) relating to his business as such.

(5) All trial balances, computations of aggregate indebtedness and net capital (and working papers in connection therewith), financial statements, branch office reconciliations, and internal audit working papers, relating to the business of such member, broker or dealer, as such.

(6) All guarantees of accounts and all powers of attorney and other evidence of the granting of any discretionary authority given in respect of any account, and copies of resolutions empowering an agent to act on behalf of a corporation.

(7) All written agreements (or copies thereof) entered into by such member, broker or dealer relating to his business as such, including agreements with respect to any account.

Disciplinary Rule 7-107(G) of the Code of Professional Responsibility of the American Bar Association provides:

> A lawyer or law firm associated with a civil

> action shall not during its investigation or litigation make or participate in making an extra-judicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:
>
> (1) Evidence regarding the occurrence or transaction involved.
>
> (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
>
> (3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
>
> (4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
>
> (5) Any other matter reasonably likely to interfere with a fair trial of the action.

Ethical Consideration 7-33 of the Code of Professional Responsibility of the American Bar Association provides:

> A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

STATEMENT OF THE CASE

On May 10, 1970, Samuel H. Sloan & Co. ("Sloan & Co.") became registered as a broker dealer with the Securities & Exchange Commission ("S.E.C."). Sloan & Co. was then a partnership consisting of Samuel H. Sloan ("Sloan") and Harry G. Theodos ("Theodos"). However, on January 11, 1971 Theodos withdrew from the partnership and at that time Sloan submitted to the S.E.C. for filing an amendment to the broker dealer registration of Sloan & Co. to reflect this change. The S.E.C., however, refused to accept this filing. Thereafter, Sloan made numerous applications to change the official status of the broker dealer registration of Sloan & Co. in such a way as to reflect the fact that it was a sole proprietorship rather than a partnership and to drop "& Co." from the words "Sloan & Co." All of these applications were rejected by the S.E.C.

On January 14, 1971, following an inspection of Sloan's office by an examiner of the S.E.C., an attorney in the New York Regional Office of the S.E.C. issued an order directing an investigation of Sloan & Co. Following the issuance of this order, members of the S.E.C. staff made frequent visits to Sloan's premises and these visits continued over the period of the next several years. In September, 1973, the S.E.C. accepted for filing a broker dealer withdrawal request from Sloan & Co. (47a)* after a previous attempt to file such a request had been rejected. However, the S.E.C. refused at that time to grant or deny the request that the broker dealer registration of Sloan & Co. be withdrawn.

In December, 1973 the S.E.C. brought to trial an action it had filed against Sloan & Co. and Sloan in June, 1971 and which had remained dormant for about two years. This trial resulted in a decision by United States District Judge Robert J. Ward which was reported as *S.E.C. v. Sloan*, 369

* Hereafter, all such references will be to pages of the appendix included in this petition.

F. Supp. 996 (S.D.N.Y. 1974) and which was followed by the entry of a judgment of injunction dated January 18, 1974. By that time all active business operations of Sloan & Co. and Sloan had ceased. The findings of fact by the District Court, which resulted in the entry of the judgment in that action, concerned violations of the bookkeeping and net capital rules which three S.E.C. investigators testified that they had found during certain of their numerous visits to Sloan's office in 1971, 1972 and 1973.

On November 6, 1974, with Sloan's broker dealer withdrawal request still not having been acted upon, Sloan sent the following letter to Mr. Jerome Selvers, a staff attorney for the S.E.C.:

November 6, 1974

Jerome Selvers
Securities & Exchange Commission
26 Federal Plaza
New York, N.Y.

Dear Mr. Selvers:

Please be advised that it is my intention to resume activities as a dealer in over-the-counter securities forthwith. For the purposes of mail and other official communications by the Securities & Exchange Commission, my address will continue to be 120 Liberty Street, New York, N.Y. 10006. However, my books and records are presently located at my personal residence at 1761 Eastburn Avenue in Bronx, N.Y. and at 917 Old Trent's Ferry Rd. in Lynchburg, Va. with the exception of those books and records which are at the United States Court of Appeals for the Second Circuit as part of the record of appeal in the appeal of S.E.C.

vs. Sloan, U.S.C.A. docket no 74-1436. You should be advised, however, that I will not permit any officer or employee of the Securities and Exchange Commission to enter my personal residence for any purpose in the absence of the production of a valid and properly authorized search warrant. In this respect, I am asserting the rights which have been guaranteed to me by the Fourth Amendment to the Constitution of the United States.

Very truly yours,

s/Samuel H. Sloan
Samuel H. Sloan

CC: United States Court of Appeals
For the Second Circuit
Foley Square
New York, N.Y.
Re: Docket No. 74-1436

Hon. Thomas P. Griesa
United States District Court
for the Southern District of N.Y.
Foley Square
New York, N.Y.
Re: 74 Civil 2792

Hon. Robert J. Ward
United States District Court
for the Southern District of New York
Foley Square
New York, N.Y.
Re: 71 Civil 2695

Thomas Taylor, Esq.
Office of General Counsel
Securities and Exchange Commission
500 North Capitol Street
Washington, D.C. 20549
Re: 71 Civil 2695

On December 19, 1974, the S.E.C. sent Sloan the following response:

Dear Mr. Sloan:

This correspondence is intended to notify you that representatives of the New York Regional Office of the Commission will visit the office of Samuel Sloan & Co. on Thursday, December 26, 1974 for the purpose of conducting an examination of the books and records of the firm relating to the firm's operation and market making activities.

As you should know, Section 17(a) of the Securities Exchange Act of 1934 requires that every registered broker-dealer prepare, maintain and preserve its books and records in accordance with the Commission's rules and regulations. Periodic, special, or other examinations by examiners or other representatives of the Commission may be made at any time, or from time to time in the public interest or for the protection of investors. Rule 17a-3 promulgated under the Securities Exchange Act of 1934 sets forth, in detail, the books and records required to be made by a broker-dealer and Rule 17a-4 determines the periods of time for which certain enumerated records must be preserved for examination in an easily accessible place. Your attention is specifically directed to Rule 15c2-11(c) which requires a broker-dealer to maintain in writing, as part of his records, that information which a broker-dealer must have to lawfully submit

quotations (i.e., make a market) in a security pursuant to the provisions of said Rule. These records, like your other records of operation are required to be preserved for examination.

The Commission examination team must have access to all the books and records of the firm in order to conduct a meaningful examination. Every effort will be made by the examiners to complete the examination promptly and efficiently without interfering with the normal course of business of the firm. The presence of a principal of the firm for the duration of the examination is not absolutely necessary, provided that back office personnel are instructed to make the firm's books and records available immediately on request and, where necessary, answer questions relating to the form and substance of books and records.

The Commission staff is not required by statute or policy, to notify broker-dealers of impending examinations. This notification, however, is intended to clarify the position of the staff with respect to problems encountered in the past, and serve as a response to your prior communication in which you stated, in effect, that you will not adhere to the abovementioned rules as you will refuse to make your records available in the absence of a search warrant. It is hoped that your cooperation will be forthcoming.

Very Truly Yours,

William Nortman,
Assistant Regional Administrator

On December 26, 1974, two S.E.C. staff investigators went to Sloan's apartment in Bronx, N.Y. and demanded that Sloan produce all of his financial records. Sloan refused to do so in accordance with the Fourth Amendment position previously stated and additionally on the grounds that S.E.C. Rule 17a-4, 17CFR §240.17a-4 does not

require him to show representatives of the S.E.C. his books and records.

On December 30, 1974, the S.E.C. instituted suit. The complaint filed by the S.E.C. in that suit demanded that Sloan and Sloan & Co. be enjoined:

> "From removing, destroying or altering the books and records of Sloan and Sloan & Co. . . ."(14a) and
>
> "That a mandatory order be issued by the Court to permit immediate examination in an easily accessible place by examiners or other representatives of the Commission of the books and records of Sloan and Sloan & Co. (or any other broker or dealer registered with the Commission of which defendant Sloan may become a principal or controlling person) as required by Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rule 17a-4 promulgated thereunder, 17 CFR 240.17a-4."

Rather than have this case assigned by lot in accordance with the Calendar Rules of the Southern District of New York, the S.E.C. attorneys proceeded to the chambers of Judge Ward, who had been the judge in the prior injunctive action, and requested that he take jurisdiction over this case. Judge Ward did so and the S.E.C. immediately presented a request for a temporary restraining and a preliminary injunction granting all of the relief requested in the complaint. Sloan was notified by telephone that the action had been commenced and that this application had been made (16a) and he proceeded to Judge Ward's chambers where one of the attorneys appearing for the S.E.C. handed him a copy of the complaint. Sloan then requested (1) that Judge Ward deny the application for a temporary restraining order (2) that he disqualify himself from proceeding further on the grounds of bias and prejudice and on the grounds that the case was not properly assigned to him and (3) that he order the S.E.C. not to

issue its customary press releases concerning this action. After a lengthy colloquy which generated a 42 page transcript, Judge Ward stated that he would recuse himself from this case but that he would sign the temporary restraining order due to the unavailability of any other judge and the lateness of the hour.

On the question of press releases, after being advised by one of the S.E.C. attorneys present that "it is the Commission's practice, and particularly at the time an action is commenced, to issue what is commonly referred to as a litigation release which may or may not be picked up by various other newspapers," Tr. 8, Judge Ward noted "certain strictures that have been put forth very recently by the American Bar Association" and, after hearing from the S.E.C. attorneys ruled:

> "Mr. Sloan has asked that there be no releases except in filed papers.
>
> I would enter an order to the effect that that be the case for both sides in this litigation. The media can be referred to the papers which are on file here at the courthouse. But if I find that either side, and I mean this, Mr. Sloan, gives out any information to the media, I will act on that matter with dispatch.
>
> Therefore, I am going to tell both sides in this case the media can be appraised there are papers on file here at the courthouse. They may examine those papers and that is where it stops.
>
> We are not going to litigate this case, either side, in the press. The press can have free access to court files.
>
> . . . . . .
>
> I recognize that the Commission has its own problems as far as its budgets and its public image is concerned. At the same time I think that the public image of any agency is enhanced by the end

> work product, not by the beginning press releases.
>
> And I would direct both sides here to issue no releases and that goes not only for those who are present here but those superiors who are not present here.
>
> You may direct the media to all filed papers, nothing more." Tr. 9-10.

When the prohibition on press releases was vehemently objected to by the S.E.C. attorneys, Judge Ward stated:

> "The other matter I would mention to you is whatever the Commission's practice is in other cases, the press may be referred to the filed papers or, if you wish to give the press an exact copy of the filed papers, you may do that.
>
> Mr. Nortman: Yes, your Honor.
>
> The Court: And, Mr. Sloan, the same thing goes for you, since this was done at your request. There is to be no materials submitted to the press other than material filed with this court. Once you have filed it with the court, you have the same prerogative as the Commission does, to present this information to any media you wish." Tr. 36-37.

The temporary restraining order expired by its terms on January 8, 1975. By that time Judge Ward had changed his mind to the extent of deciding that he would not recuse himself from this case. Since he was out of town, Judge Griesa, at his request, extended the temporary restraining order for another ten days until January 17, 1975. Sloan then unsuccessfully requested a writ of mandamus disqualifying Judge Ward from this case. *Sloan v. Ward*, Dkt. No. 75-3001 (2d Cir. Jan. 16, 1976) (no opinion). Thereafter, on January 17, 1975, Judge Ward signed an order of injunction granting all of the relief requested by the S.E.C. without requiring the S.E.C. to call any witnesses in its behalf. Sloan filed a notice of appeal from this

injunction and moved in the United States Court of Appeals for the Second Circuit for a stay of the injunction and for an expedited appeal. These motions were denied on February 13, 1975.

In spite of having obtained two temporary restraining orders and an injunction, each of which granted all of the relief requested in the complaint, the S.E.C. made no attempt to examine Sloan's financial records until March 5 and March 6, 1975, on which dates two S.E.C. investigators went to Sloan's apartment in Bronx, New York. Sloan was not present on either date and no further attempts were made to examine Sloan's financial records. On March 9, 1975, while a pedestrian in upstate New York, Sloan was struck by an automobile with the result that both of his legs were broken. Thereafter, Sloan was hospitalized in Plattsburgh, New York (34a). The S.E.C. was notified of this development and responded on March 25, 1975 by moving to adjudge Sloan in contempt of court. No order to show cause or order of arrest was obtained and personal service of the motion papers on Sloan was not attempted by the S.E.C. Instead, the S.E.C. mailed a copy of the moving papers to the hospital where Sloan was recuperating and to various other addresses for Sloan (31a).

On March 23, 1975, Sloan was transferred to his hometown of Lynchburg, Virginia and shortly thereafter was hospitalized at the Lynchburg General Hospital. Sloan then advised Judge Ward by letter that the prognosis was that he would not be able to walk for approximately six months. (32a-33a).

The S.E.C.'s motion to adjudge Sloan in contempt was made returnable on April 1, 1975, seven days after the motion was filed. Due to his severe physical injuries Sloan was unable to respond. The motion papers consisted of an affidavit of Ira B. Spindler ("Spindler"), which stated in part:

> "This affidavit is based upon my personal knowledge of the facts, correspondence and other documents contained in the files of the Commission, information received from the National Quotation Bureau ("NQB"), information contained in the pleadings, affidavits and transcripts of hearings in this action, discussions with various staff members of the Commission, and upon information and belief." (24a-25a).

The affidavit consisted essentially of an account of the judicial proceedings through January 17, 1975 and then recounted a telephone conversation between Sloan and S.E.C. staff attorney Ralph Pernick ("Pernick"). The affidavit was not based upon Spindler's personal knowledge of what was said in this telephone conversation but rather on a letter dated February 27, 1975 from S.E.C. Assistant Regional Administrator William Nortman ("Nortman") to Sloan which had described this conversation. However, neither Nortman nor Spindler had personal knowledge of this telephone conversation and the original source for the facts set forth in the affidavit was not stated. The affidavit concluded by recounting two visits by Spindler to Sloan's apartment on March 5 and March 6, 1975 when Spindler found that Sloan was not present and by stating that Sloan had been listing securities in the pink sheets and had "failed utterly to comply with the laws applicable to broker-dealers" by refusing to "permit an immediate examination of his books and records." Three exhibits were annexed to this affidavit consisting of (1) the November 6, 1974 letter from Sloan to the S.E.C. (2) the February 27, 1975 letter from Nortman to Sloan and (3) sample pages from the pink sheets.

Judge Ward waited until July 22, 1975 to decide the S.E.C.'s motion to adjudge Sloan in contempt of court and then did so without a hearing, without receiving a response from Sloan, and without oral testimony of any kind. His decision, which was endorsed by hand on the back of the S.E.C.'s motion papers, was as follows:

"Defendant Samuel H. Sloan ("Sloan") has wilfully violated the preliminary injunction entered on January 17, 1975 and served personally upon him on that date. Sloan has refused to permit inspection of his books and records by representatives of the Securities & Exchange Commission ("the Commission") as directed by the Court and has indicated that he will continue to do so.

Accordingly, the Commission's motion to adjudge Sloan in contempt of this Court is granted and Sloan is adjudged in civil contempt. In view of his physical condition, the Court will not at this time order his imprisonment or impose a fine but will instead direct that Sloan's books and records be removed to a place where they may be inspected by representatives of the Commission as directed in the preliminary injunction.

Settle order on notice.

Robert J. Ward, U.S.D.J."

By the time of the July 22, 1975 decision, a number of events had transpired and a number of additional motions were pending. Several of these motions were filed by Sloan who, although unable to walk as a result of his injuries, nevertheless was capable of filing motions by mail along with proof of service upon the S.E.C. Judge Ward, as he decided these and subsequent motions, mailed a copy of his decisions to Sloan, who remained incapacitated. All but one of the motions pending on July 22, 1975 was decided on that date and in each case the decision consisted of a handwritten memorandum endorsed on the back of the motion papers.

On March 6, 1975, three days before being injured in the automobile accident, Sloan had moved to enjoin the S.E.C. from harassment and annoyance. This motion was decided

on July 22, 1975 with the words:

"Motion denied. So ordered.
Robert J. Ward, U.S.D.J."

On April 28, 1975, the S.E.C. had issued an administrative decision and order which (1) denied Sloan's request to withdraw the broker dealer registration of Sloan & Co. (2) revoked the broker dealer registration of Sloan & Co. and (3) barred Sloan for life from being associated with any broker or dealer. The decision of the S.E.C. stated that it had decided to impose these penalties based on (1) the record of an administrative hearing held from October 30 to November 1, 1972, (2) the injunctions signed by Judge Ward on January 18, 1974 and January 17, 1975 and (3) statements made by Sloan in papers filed in the United States Court of Appeals for the Second Circuit in the petition for a writ of mandamus which was denied on January 16, 1975 and in the motion for a stay of Judge Ward's order which was denied on February 13, 1975. The decision of the S.E.C. is reported as *Samuel H. Sloan*, Securities Exchange Act Release No. 11376, 6 SEC Docket 772 (April 28, 1975). After receiving this decision, Sloan moved to dismiss the court action as moot and to vacate the two injunctions previously obtained by the S.E.C. on the grounds that since he was no longer a registered broker dealer, he could no longer violate the rules applicable only to brokers and dealers. On July 22, 1975, Judge Ward decided this motion as follows:

"In view of the revocable nature of the sanctions imposed by the Securities & Exchange Commission (*Hanly v. Securities & Exchange Commission*, 415 F. 2d 589, 598 (2d Cir. 1969)), and in view of what this Court considers the substantial probability that the violations to which the permanent injunction was addressed may be repeated, defendant's motion to vacate the permanent injunction and for other relief is in all respects denied.

It is so ordered

Robert J. Ward, U.S.D.J."

After the administrative decision of April 28, 1975, the S.E.C., on May 6, 1975, issued a press release. See *S.E.C. News Digest* Vol. 6, No. 18 p. 2 (May 6, 1975). This press release stated:

"The Commission has revoked the broker-dealer registration of Samuel H. Sloan & Co., of *New York City*. The Commission also found it in the public interest to bar its sole proprietor, Samuel H. Sloan, from association with any broker or dealer. The Commission's action was based on Sloan's persistent, wilfull violations of the Exchange Act's record keeping, net capital, and reporting provisions and on injunctive decrees restraining him from violations of the recordkeeping and net capital provisions. The Commission concluded that: "Sloan's violations are neither trivial nor technical. They involve flagrant and long-continued breaches of significant duties imposed on persons in the securities business."

The Commission's opinion also noted that the United States District Court for the Southern District of New York has enjoined Sloan from refusing to make his records available for examination by the Commission's representatives and from initiating quotations for over-the-counter securities when he lacks the information called for by the Commission's Rule 15c2-11. Though this injunction is the subject of a pending appeal, the Commission thought it of some significance "that a court of competent jurisdiction found the second injunction appropriate and that it did so over Sloan's vehement opposition" and that "Sloan's own papers in the second injunctive suit show his continuing disposition to disregard or defy the rules governing registered broker-dealers."

Sloan then moved to adjudge the S.E.C., its Commissioners, its Secretary and its counsel in contempt of court and to disbar and disqualify counsel for the S.E.C. from appearing in this case on the grounds that this press release violated the court's order and the Code of Professional Responsibility of the American Bar Association. Sloan also moved to vacate the preliminary injunction on the grounds of failure to comply with Rule 65, Fed. R. Civ. P. and to dismiss the action. These motions were decided on July 22, 1975 as follows:

"Motion disposed of as follows:

That branch of the motion which seeks to vacate the preliminary injunction is denied for lack of jurisdiction since the validity of the injunction is presently before the court of appeals.

That branch of the motion which seeks to hold plaintiff, its Commissioners and other employees in contempt of court is denied. The release in question did not violate this Court's oral order of December 31, 1974. The order granted in response to defendants' application for a restraint on the issuance of press releases 'with regard to the commencement of this action' did not prohibit releases such as those issued here, describing 'the end work product.'

The remaining branches of defendants' motion, some of which have heretofore been denied, have all been reconsidered and, upon reconsideration, are in all respects denied.

So ordered.

Robert J. Ward, U.S.D.J."

The single motion which remained outstanding after the July 22, 1975 decisions was a motion by the S.E.C. for a stay of all discovery by defendants pending the outcome of the appeal from the injunction and for a protective order

directing that interrogatories propounded by Sloan need not be answered by the S.E.C. On August 4, 1975, Judge Ward decided this motion as follows:

> "Motion disposed of as follows:
>
> That branch of the motion seeking to stay discovery pending the outcome of defendant's appeal of the preliminary injunction is, in the Court's discretion denied.
>
> That branch of the motion seeking a protective order is granted as to Interrogatory Nos. 5, 8, 9, 10, 11, 12, 13 and 14. These interrogatories do not appear to be relevant or reasonably calculated to lead to the discovery of admissible evidence. It is denied as to Interrogatories 1, 2, 3, 4, 6 and 7. Answers to these six Interrogatories shall be served and filed within 30 days of the date of this decision.
>
> It is so ordered.
>
> Robert J. Ward, U.S.D.J."

After receiving the July 22, 1975 decision adjudging him to be in contempt of court, Sloan filed a motion for (1) reargument, (2) a hearing and/or a jury trial, (3) an order pursuant to 28 U.S.C. §144 and 28 U.S.C. §455 disqualifying Judge Ward from proceeding further, (4) a stay pending appeal and (5) a transfer of this case to the District Court for the Western District of Virginia, Lynchburg Division (38a). Judge Ward decided this motion on August 18, 1975 as follows:

> "Defendant having failed to present facts or legal reasons sufficient to form a basis for the granting of any portion of his motion, the motion is in all respects denied.
>
> It is so ordered.
> Robert J. Ward U.S.D.J."

On September 2, 1975 the S.E.C. filed a five page document entitled "Plaintiff's Answers to Defendant's

Interrogatories." However, none of the interrogatories were answered except one which gave an answer "upon information and belief." The remaining "answers" stated that the answers could be found from an examination of documents in the possession of the S.E.C. and that under Rule 33(c), Fed. R. Civ. P. no answer was required. (46a-49a).

On September 3, 1975 Judge Ward signed an "order of civil contempt" in which Sloan was "granted twenty (20) days . . . within which to purge his contempt" and which ordered Sloan to appear "for sentencing" on September 26, 1975 and further ordered that if Sloan did not appear for sentencing the United States Marshal was ordered to arrest and confine him "until he permits immediate examination in an easily accessible place . . . of the books and records of Sloan & Co." On September 26, 1975, after the Court of Appeals denied Sloan's motion for a stay and an expedited appeal, Sloan did not appear for sentencing and Judge Ward ordered the U.S. Marshal to arrest him.

Sloan filed a notice of appeal from the orders of Judge Ward and filed a motion in the District Court for immunity from arrest on the grounds that the summons and complaint had never been served by the U.S. Marshal as required by Rule 4(c) Fed. R. Civ. P. and that as a result the court had never acquired personal jurisdiction over him and that immunity from arrest was necessary in order to enable Sloan to argue his appeal orally in the United States Court of Appeals for the Second Circuit while preserving his jurisdictional arguments. Sloan also moved to adjudge the S.E.C. in contempt of court for failing to answer the interrogatories as required by the court's August 4, 1975 order. The S.E.C. cross-moved for an order staying all discovery by defendants until Sloan purged his contempt.

These three motions were decided on December 24, 1975. The motion for immunity from arrest was decided as follows:

> "Inasmuch as the complaint was handed to

Samuel H. Sloan ("Sloan") in the presence of the Court on December 30, 1974 and its receipt acknowledged by him (see Transcript of December 30, 1974, pages 11-12), Sloan's argument that this Court has no personal jurisdiction over him, "the summons and complaint having never been served," and that he is therefore immune from arrest and from service of process in the State of New York is without merit. Accordingly, the motion is in all respects denied.

It is so ordered.
Robert J. Ward, U.S.D.J."

The motion to adjudge counsel for the S.E.C. in contempt was decided as follows:

"Motion denied without prejudice to renewal at such time as defendant Samuel H. Sloan purges his contempt by permitting examination in an accessible place by representatives of plaintiff of the books and records of Samuel H. Sloan & Co. as heretofore ordered by this Court.

It is so ordered.
Robert J. Ward, U.S.D.J."

The motion by the S.E.C. for a stay of defendant's discovery was decided as follows:

"Motion granted. All further discovery by defendants is stayed until defendant Samuel H. Sloan ("Sloan") purges his contempt by permitting examination in an accessible place by representatives of plaintiff of the books and records of Samuel H. Sloan & Co. as heretofore ordered by this Court.

It is so ordered.
Robert J. Ward, U.S.D.J."

In December, 1975 Sloan drafted his brief in this appeal and in an appeal which resulted in a decision reported as

Sloan v. S.E.C., 535 F. 2d 676 (2d Cir. 1976), *cert. denied* Dkt. No. 76-58 (Oct. 12, 1976). Thereafter, as was his custom, Sloan went to Iceland for the annual New Year's celebration. The District Court and the S.E.C. were notified of Sloan's change of address. Sloan then filed a motion in the United States Court of Appeals for the Second Circuit for immunity from arrest and a temporary stay of Judge Ward's order which Judge Ward had denied. (54a). The Court of Appeals, however, never decided this motion. Instead, on January 7, 1976 it *sua sponte* dismissed Sloan's appeal from the injunction in the instant case and simultaneously dismissed Sloan's appeals in two other actions instituted by the S.E.C. See *S.E.C. v. Sloan*, 538 F. 2d 313 (2d Cir. 1976), *cert. denied* Dkt. No. 76-365 (Dec. 13, 1976); *S.E.C. v. Canadian Javelin Ltd.*, 538 F. 2d 313 (2d Cir. 1976), *cert. denied* Dkt. No. 76-365 (Dec. 13, 1976).

Upon learning of this decision, Sloan decided to return to the United States immediately. He was unable to do so the next day due to inclement weather conditions. As a result, he faced dismissal of yet a fourth appeal which had been scheduled for argument on January 27, 1976. However, on January 26, 1976, Court of Appeals Judge William H. Mulligan resolved that problem at Sloan's telephone request by entering an order which adjourned the oral argument of that appeal until Februrary 2, 1976 on the prior condition that Sloan appear before Judge Ward for disposition of the contempt charge. Sloan did so. These facts are set forth on pages 6-7 of a motion for leave to file a petition for a writ of mandamus presently pending before this Court. *Sloan v. Mulligan*, Dkt. No. 76-615.

When Sloan appeared before Judge Ward, which was on the morning of February 2, 1976, he notified the Court that he did not possess any books and records of Sloan & Co. and that all books and records of Sloan & Co. were in the possession of his mother, Dr. Marjorie Sloan, at her residence in Lynchburg, Va. and that she had called

Thomas L. Taylor III, the S.E.C. attorney in Washington, D.C. handling this case, and had offered to show S.E.C. representatives all of the books and records of Sloan & Co. but that Taylor had stated that the S.E.C. was unwilling to undertake an examination of the books and records of Sloan & Co. in Virginia (58a, 80a-81a, 84a). Sloan also notified the Court that approximately one year had passed since the S.E.C. had last made any request of Sloan to examine Sloan's books and records and that he had suffered two broken legs and had been incapacitated for a long period of time during which he would have been incapable of preventing the S.E.C. from examining his books and records had any attempt been made to do so. Two attorneys representing the New York Regional Office of the S.E.C. appeared before Judge Ward and stated that they had no personal knowledge of any telephone conversations between Taylor and Sloan's mother. Judge Ward then conducted a hearing at which Sloan and S.E.C. attorney Pernick testified. The testimony concerned primarily a conversation which had taken place between Sloan and Pernick some time between September 3, 1975 and September 20, 1975. Sloan testified that he had called Pernick and that Pernick had told him that the New York Regional office of the S.E.C. had no interest in examining Sloan's books and records. (66a). Pernick testified, to the contrary, that he had called Sloan and had asked Sloan what time would be convenient for an examination of his books and records and that Sloan had refused to allow inspection of his books and records. Tr. 47. After hearing this conflicting testimony, Judge Ward made oral findings of fact and conclusions of law, see Appendix T, remanded Sloan to the custody of the U.S. Marshal and directed representatives of the S.E.C. to contact Dr. Marjorie Sloan and be prepared to proceed to Lynchburg, Va. forthwith for the purpose of examining Sloan's books and records. Sloan was then confined to the Metropolitan Correctional Center in New York City.

On February 4, 1976 Judge Ward announced at the request of the S.E.C. that Sloan had purged his contempt and Sloan was released from custody. See Appendix U (88a).

On February 6, 1976 Sloan moved to reinstate the three appeals which had been dismissed on January 7, 1976. This motion was denied on March 15, 1976. The Court of Appeals then scheduled the argument of the instant appeal from Judge Ward's orders for April 27, 1976. The Washington, D.C. office of the S.E.C. thereafter filed a motion in the Court of Appeals to dismiss the appeal as moot without oral argument and almost simultaneously the New York Regional Office of the S.E.C. filed a motion in the District Court for summary judgment. The Court of Appeals, however, advised the S.E.C. that it wished to hear oral argument on the appeal. The oral argument was held and on May 10, 1976 the Court of Appeals dismissed in part and affirmed in part the appeal from Judge Ward's orders. It is with respect to this decision that the petitioner now seeks a writ of certiorari. On August 18, 1976, Judge Ward decided the S.E.C.'s motion for summary judgment by dismissing the action as moot. No appeal was taken from that decision.

REASONS FOR GRANTING THE WRIT

Prior to the commencement of this action, Sloan took the position that no S.E.C. rule specifically required him to show his books and records to representatives of the S.E.C. and moreover that the Fourth and Fifth Amendments to the Constitution prohibited the S.E.C. from requiring him to grant general and continuous access to his books and records. The taking of this position had, as a direct consequence, the commencement of this lawsuit.

The question thus raised would seem clearly to have been settled in Sloan's favor by this Court's decision in *See v. City of Seattle*, 387 U.S. 541, 543 (1967) where the Court

discussed regulations by administrative agencies similar to that of the S.E.C. and stated:

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable office entries upon his commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant."

That decision is directly on point in this case where S.E.C. field investigators, without evidencing any official authority in the form of a warrant or otherwise, made frequent visits to Sloan's office over a period of several years in a seemingly endless search for violations of S.E.C. rules until finally Sloan was harassed to the point of taking the extreme position that his doors were no longer open to S.E.C. staff investigators. As a direct consequence of Sloan's assertion of a constitutional right to be "secure" in his "papers and effects" as guaranteed by the Fourth Amendment, Sloan has since been subjected to the prosecution of an injunctive action, has been enjoined, has been barred for life from being associated with any broker or dealer, has spent two days in jail and has had all avenues of appellate review cut off by the summary dismissal of three appeals and by technical rulings in the decision sought to be reviewed here about what constitutes an appealable order. The question presented to this Court is whether this result is to be permitted. This, it is submitted, is a question of sufficient importance as to require the granting of certiorari.

As noted previously, a petition for a writ of certiorari which sought review of the summary dismissals of three appeals was denied by the Court on October 13, 1976. See *Sloan v. S.E.C.*, Dkt. No. 76-365. However,

simultaneously with the filing of the instant petition, a petition for a rehearing of the denial of that petition for a writ of certiorari is also being filed. This is appropriate in view of intervening circumstances, namely a decision of the United States Court of Appeals for the Second Circuit dated November 18, 1976, which is included as Appendix X to this petition, and which affirmed the revocation of Sloan's broker dealer registration and the lifetime bar imposed on Sloan on the basis of two of the injunctions which were the subject of the earlier petition, and a decision dated December 6, 1976 in which the Court of Appeals denied a petition for a rehearing and the suggestion that the rehearing be en banc in the instant case. It is noteworthy that the Court of Appeals took the unusually long period of more than six months before denying the latter petition and this would seem to indicate that there is some doubt in the minds of the judges of the Court of Appeals as to the correctness of this decision.

With respect to the contempt order, to which Sloan devoted most of his 72 page brief, the Court of Appeals ruled:

> "The order from which Sloan now seeks to appeal is both in form and in substance an order of civil contempt. An order of civil contempt against a party to the litigation is not an appealable final order. 9 Moore, Federal Practice ¶110.13 [4]. Moreover, after filing and briefing this appeal, Sloan purged himself of contempt, and on February 4, 1976, Judge Ward entered an order to that effect. Thus, no live controversy remains as to any of the alleged errors in the contempt adjudication, and the appeal from the order of contempt is moot."

In view of the foregoing statement of the case, a number of errors in this opinion should be apparent. First Sloan did not purge himself of contempt. Sloan did not possess

any books and records when he entered Judge Ward's courtroom on February 2, 1976 and had not possessed any financial books and records for a considerable period of time. The books and records the S.E.C. apparently was seeking were in the possession of Sloan's mother, who had previously notified the S.E.C. that they were available for inspection, but the S.E.C. had chosen not to inspect them. It is clear that during the two days from February 2, 1976 to February 4, 1976 which Sloan spent in the Metropolitan Correctional Center in New York City, Sloan did not show representatives of the S.E.C. the books and records which were located in Lynchburg, Va. Thus, Judge Ward's declaration at the request of the S.E.C. that Sloan had purged himself of contempt was designed to do nothing more than frustrate Sloan's right to appellate review of the validity of the contempt order and to avoid a situation where it would become obvious that the time and energy spent by the District Judge and the U.S. Marshal in pursuit of this matter had been wasted since the S.E.C., by resorting to other measures such as a subpoena served on Sloan's mother, could easily have obtained access to the books and records at any time during the preceding eleven months.

The fact that the S.E.C. could have served a subpoena in this case and chose not to do so raises another point. In order to be entitled to an injunction, the S.E.C. was required to demonstrate irreparable harm and the inadequacy of legal remedies. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 29, 57 (1975). At the conference in Judge Ward's chambers on December 30, 1974, at the time this action was commenced, Sloan indicated that if a subpoena were served upon him he might produce the books and records or he might move to quash. However, the service of a subpoena was precisely what the S.E.C. was trying to avoid because the interests of the S.E.C. in this case were not so much in examining Sloan's books and records on this particular occasion as in establishing its right to

examine Sloan's books and records and the books and records of all persons subject to the jurisdiction of the S.E.C. at any time without the necessity of serving a subpoena or obtaining a warrant. However, an injunctive action is not an appropriate proceeding to assert such a right as evidenced by the course which this lawsuit took.

With respect to Sloan's appeal from the contempt adjudication, the Court of Appeals made four legal rulings, and it can be seen that none of these are correct. It stated: (1) the order was in form and substance an order of civil contempt (2) an order of civil contempt as to a party in litigation is not appealable (3) Sloan thereafter purged his contempt and (4) as a result Sloan's appeal is moot. As to the first, it is true that Judge Ward's order states on its face that it is an order of civil contempt. However, that is not enough. The power of a federal court to adjudge a person in civil contempt is limited by statute. *In re Mc Connell*, 370 U.S. 230, 234 (1962); *United States v. Temple*, 349 F. 2d 116, 117 (4th Cir. 1965). Thus, for Judge Ward's order to be valid as an order of civil contempt, it must be authorized by a specific statute. In this case, the order does not refer to any statute on its face and no statute has been cited by the S.E.C. as giving Judge Ward the authority to do what he did. Indeed, the only statute which gives a federal court the power to adjudge a person in civil contempt is 28 U.S.C. §1826 which deals with "recalcitrant witnesses." However, that statute clearly does not apply here since the S.E.C. did not seek Sloan as a witness "in any proceeding before or ancillary to any court or grand jury" but stated that it sought to examine Sloan's books and records in the normal course of the exercise of its regulatory duties and ultimately did so out of Sloan's presence. However, assuming that 28 U.S.C. §1826 could be said to apply, that section also provides that the Court of Appeals is required to dispose of any appeal from an order of confinement within thirty days of the filing of the appeal. Here the Court of Appeals did not do so and demonstrated

that it had no intention of doing so by denying Sloan's motion for a stay and an expedited appeal on September 26, 1975.

Since it is clear that Judge Ward did not and could not have adjudged Sloan to be in civil contempt, it follows that he must have adjudged Sloan to be in criminal contempt. This follows as well from the nature of the underlying order since wilfull violation of an order of injunction is in the nature of criminal contempt. 18 U.S.C. §401; *Bray v. United States*, 423 U.S. 73, 74-75 (1975). An order finding a party in criminal contempt is, of course, appealable, *Bloom v. Illinois*, 391 U.S. 194, 201 (1968), and such an appeal does not become moot merely upon release of the contemnor from confinement. *United States v. Schrimsher*, 493 F. 2d 842, 843 (5th Cir. 1974); *Sibron v. New York*, 392 U.S. 40, 51 (1968).

The Court of Appeals was also in error in ruling that a party to litigation may not appeal from an order of civil contempt. In support of this proposition the Court of Appeals cited 9 Moore's Federal Practice ¶110.13 [4] which in turn relied upon *Fox v. Capital Co.*, 299 U.S. 105 (1936). However, that case concerned nothing more than an appeal from an order refusing to quash a witness subpoena, see *Capital Co. v. Fox*, 85 F. 2d 97 (2d Cir. 1936), and the Supreme Court's statements about what would happen if a party were found to be in civil contempt were dictum. Indeed, in *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), only five years after *Fox*, this Court reviewed an order adjudging the plaintiff in civil contempt and ordered her release.

Moreover, in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 545-546 (1949) this court stated that under 28 U.S.C. §1291 appeals may be taken from "orders other than final judgments when they have a final and irreparable effect of the rights of the parties." Imprisonment is a clear case of an "irreparable effect" and it

follows that an order directing the confinement of a person is invariably appealable. cf. *International Business Machines Corp. v. United States*, 471 F. 2d 507, 512-513 (2d Cir. 1972), *reversed en banc*, 480 F. 2d 293 (2d Cir. 1973), *cert. denied*, 416 U.S. 980 (1974). See also Judge Moore's dissenting opinion, 480 F. 2d 299, 301-302. This is particularly true here since Judge Ward stayed all defendant's discovery until he had purged his contempt with the result that Sloan could have spent the rest of his life in jail without there ever being a trial on the merits of the S.E.C.'s case or the right to appellate review assuming the Court of Appeals is correct in its statement that the contempt order here is not appealable.

Finally, the Court of Appeals rules that the entire matter is moot. This is clearly incorrect as is demonstrated by the fact that at the time the appeal was decided there was pending in the District Court the S.E.C.'s motion for summary judgment based in part on the fact that Judge Ward had held Sloan in contempt. (102a). Moreover, Judge Ward's contempt adjudication had as a direct consequence the summary dismissal, without notice and the opportunity for a hearing, of three Sloan appeals. The brief for the S.E.C. filed in this Court in opposition to the petition for a writ of certiorari in *Sloan v. S.E.C.*, Dkt. No. 76-365 states:

> "Dismissal of the appeals in these cases seems particularly appropriate in view of petitioner's efforts to avoid—by going to Iceland—complying with a lawful order of the Court in one case while seeking review of orders in the same and related cases."

The key word here is "lawful" because if an appellate court were to rule that Judge Ward acted unlawfully in ordering Sloan arrested and confined for civil contempt, which is what Sloan is asking the appellate courts to do by prosecuting this appeal, then the position taken by the

S.E.C. would be untenable and the three appeals would be required to be reinstated. Since Sloan has been barred for life from the securities industry and this decision has been affirmed by the Court of Appeals on the basis of the injunctions which Sloan was seeking to have reviewed in two of the three dismissed appeals, it follows that if those appeals were reinstated and if Sloan were to prevail on the merits, then Sloan would be reinstated as a broker dealer. The S.E.C. itself has stated that it would entertain an application to do this. *In the Matter of C.R. Richmond.* Securities Exchange Act Release No. 12535, 9 S.E.C. Docket 846, 847 n. 11 (June 10, 1976) citing *Samuel H. Sloan, supra.* In addition, a variety of collateral consequences may and no doubt will result from Judge Ward's contempt adjudication. For instance, in arguing at Sloan's appeal from the order of the S.E.C. revoking Sloan's broker dealer registration, counsel for the S.E.C. stated that the contempt adjudication should form an additional basis for affirmation of the S.E.C.'s administrative order even though the administrative order was issued before Sloan was held in contempt. It is thus obvious that if Sloan reapplies for admission into the securities industry, as under S.E.C. rules he is permitted to do, *Hanly v. S.E.C.*, 415 F. 2d 589, 598 (2d Cir. 1969), the contempt adjudication will be held against him. Thus, under *Sibron v. New York, supra* 392 U.S. at 53-58 this case clearly is not moot.

It is submitted that this case presents important questions which require plenary review by this Court. If the present decision is allowed to stand it will create a loophole in the law established by prior Supreme Court decisions. For instance, in *United States v. Ryan,* 402 U.S. 530, 532 (1971), this Court stated that in the case of a subpoena served in a criminal case, a party is required to disobey the order of the court and to be held in contempt in order to obtain appellate review of the validity of the subpoena. Similarly, one court has expressed approval of the S.E.C.'s

stated position that one who wishes to contest the validity of an S.E.C. rule is required to violate the rule and wait until the S.E.C. commences enforcement proceedings and then challenge the rule in the enforcement proceeding. *PBW Stock Exchange v. S.E.C.*, 485 F. 2d 718, 725 (3rd Cir. 1973) *cert. denied.* 416 U.S. 969 (1974). In this case, the S.E.C. has contended that the rule which gives it the authority to examine the books and records of a broker dealer is Rule 17a-4, which requires all brokers and dealers to "preserve" their books and records "in an easily accessible place." The S.E.C. interprets the words "easily accessible place" as meaning a place easily accessible to representatives of the S.E.C. even though the rule says nothing regarding the S.E.C.'s authority to inspect books and records. As a result, the words "easily accessible place" were incorporated in the original temporary restraining order, in the injunction and in the contempt order. This in itself was a cause of dispute because apparently the S.E.C. took the position that Lynchburg, Va. was not a place easily accessible ~~for~~ representatives of the S.E.C.

However, Sloan's underlying position was that even if there is a rule which requires all brokers and dealers to show their books and records to the S.E.C., that rule is unconstitutional as violative of the Fourth and Fifth Amendments. The validity of that position has not yet been adjudicated by the Court of Appeals and can never be adjudicated by the Court of Appeals if the present decision is allowed to stand. At the same time, the S.E.C. will have an expedient means whereby it can obtain financial and other records of every person and corporation in the United States without having to worry about the possibility of appellate review. Instead of serving a subpoena, the S.E.C. will institute a suit, as it did here, for a mandatory injunction requiring the production of financial records. The S.E.C. will then apply to the Court for an immediate temporary restraining order. The judge will be able to

grant this temporary restraining order and/or a preliminary injunction knowing that appellate review can never be had. If the party adversely affected appeals and produces the financial records, the appeal will be dismissed as moot. If the party adversely affected appeals and does not produce the financial records, he will be held in contempt of court and the appeal from the original order will be dismissed in accordance with *S.E.C. v. Sloan*, 538 F. 2d 313 (2d Cir. 1976). Thus, regardless of what the party does, appellate review will not be available. Finally, an appeal from the contempt order will be dismissed in accordance with the opinion in the instant case which states that an order of civil contempt as to a party to the litigation is not appealable. Thus, there will be no appellate forum available to adjudicate a valid legal and constitutional claim. This result is clearly in conflict with the procedures for the "orderly and expeditious administration of justice" set forth in *Maness v. Meyers*, 419 U.S. 449, 459-461 (1975) and consequently this petition for a writ of certiorari should be granted.

If this Court agrees and finds that the Court of Appeals erred in dismissing the appeal from the order adjudging the petitioner in contempt, it will then reach questions which the Court of Appeals failed to reach concerning whether Judge Ward acted properly. It is submitted that the answer to these questions is obvious and indeed the brief the S.E.C. filed in the Court of Appeals, which was only seven pages long, did not say a word in defense of Judge Ward's actions. Judge Ward had clearly become embroiled in a running personal controversy with the petitioner (see e.g. 44a, 71a-72a) and hence under *Taylor v. Hayes*, 418 U.S. 488, 501-503 (1974) he was disqualified from adjudging the petitioner in contempt, a fact which the petitioner pointed out to Judge Ward repeatedly, (see e.g. 43a-44a, 82a-84a). Moreover, since the finding that the petitioner was in contempt was based upon circumstances which did not occur in the presence of the judge, the petitioner was

entitled to a hearing, the opportunity to cross-examine witnesses and to have the facts tried by a jury. *Bloom v. Illinois, supra.* As this Court has stated "A right to jury trial is granted to criminal defendants to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). The fact that the S.E.C. couched its complaint in this case in terms of "equitable relief" does not change this result since what is involved here is a remedy of the sort traditionally enforced in an action at law. *Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974); *Curtis v. Loether*, 415 U.S. 189, 195 (1974); contra *S.E.C. v. Petrofunds, Inc.*, 420 F. Supp. 958 (S.D.N.Y. 1976).

Moreover, the Judge Ward ingored the notice and hearing requirements and all of the other requirements of Rule 42(b) Fed. R. Crim. P. and ignored as well all of the applicable case law regarding contempt in respects too numerous to be recited in detail here. In addition, in view of Sloan's physical condition it was error not to transfer this case to the Western District of Virginia, Lynchburg Division, where Sloan and the books and records of Sloan & Co. would have been within the court's bailiwick and a meaningful opportunity for a hearing could have been provided (45a).

Other questions presented in this petition are of sufficient importance as to require review on certiorari. There is the question concerning S.E.C. press releases. The S.E.C. routinely issues a press release whenever it institutes suit and issues further press releases at various stages of the litigation. Anyone who has been the subject of one of these press releases is aware of the serious economic repercussions that can result. Indeed, the leverage the S.E.C. obtains as a result of its policy of issuing these press releases probably explains the fact that most defendants named in S.E.C. suits consent to an injunction without admitting or denying the charges at the same time that the action is commenced.

Sloan has been the subject of numerous S.E.C. press releases and therefore it is not surprising that he asked Judge Ward for an order prohibiting their issuance in connection with this case. The issuance of an S.E.C. press release has the effect of branding the subject of the press release as a criminal without a judicial trial. Indeed, it appears that the motivation for the S.E.C. to institute as many lawsuits as it does is the favorable publicity which the S.E.C. receives as a result of these press releases. The methods adopted by the S.E.C. are of a type which were specifically condemned by this Court in *Jenkins v. McKeithen*, 395 U.S., 411, 424-428 (1969) as violating the constitutional rights of persons in a position similar to that of Sloan.

After Judge Ward gave an oral order restricting the parties' press releases, the S.E.C. issued a press release anyway. Judge Ward, nevertheless, refused to hold the S.E.C. in contempt. Although the Court of Appeals was correct in stating that Judge Ward ruled that the press release in question did not violate his order, it is readily apparent that Judge Ward was in error and what he in fact did was to back down from his previous decision to restrict press releases. The preliminary injunction obtained by the S.E.C. on January 17, 1975 was no more "end work product" than was the temporary restraining order which Judge Ward signed when he restricted the parties' press releases in the first instance.

However, the underlying question is whether the Code of Professional Responsibility of the American Bar Association prohibits the issuance of the press releases because if it does, Sloan would be entitled to the additional relief requested, namely disqualification and disabarrment of counsel for the S.E.C., irrespective of Judge Ward's prior order. It is submitted that this presents an important question which should be reviewed on certiorari. As this Court stated in *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966):

> "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."

Although this case does not involve a criminal trial, S.E.C. injunctive actions are viewed by the general public as a method of prosecuting so-called "white collar criminals" and unfair publicity can have the same and often worse economic consequences as it would have in a criminal case. This Court recently addressed a related problem in *Paul v. Davis*, 424 U.S. 693 (1976). As to the possible problem of mootness, it is apparent from this Court's decision in *Nebraska Press Asso. v. Stuart*, —— U.S.——, 49 L. Ed. 2d 683, 690 (1976) that the question presented is not moot. In fact, on September 1, 1976 the S.E.C. issued a press release captioned:

> "SAMUEL H. SLOAN FOUND TO HAVE VIOLATED THE QUOTATION INITIATION AND BOOKKEEPING RULES; INJUNCTION DENIED" SEE *S.E.C. NEWS DIGEST*, VOL. 10, No. 7 p. 2; 10 S.E.C. DOCKET 397 (SEPT. 1, 1976).

This press release, which delt with Judge Ward's decision of August 18, 1976, was clearly false and misleading since Judge Ward made no findings of fact, and could not have done so on the record before him, and dismissed the action as moot. It is clear that if judicial remedies are not available to stop the issuance of these malicious press releases, irreparable harm "capable of repetitive yet avoiding service" will continue to result to Sloan.

Another question presented in this petition is whether the S.E.C. has the authority to prosecute actions in its own behalf. The case which gave the S.E.C. the authority to represent itself in federal court is *S.E.C. v. Robert Collier & Co.*, 76 F. 2d 939 (2d Cir. 1935). Prior to that decision, the rule, as set forth in *S.E.C. v. Stock Market Finance*, 10

F. Supp. 95 (S.D.N.Y. 1935), was that litigation involving government agencies must be conducted by officers of the Department of Justice. This question involves purely statutory construction. The question is whether 28 U.S.C. §516 which states that "except as otherwise authorized by law, the conduct of litigation in which the United States, an agency or officer thereof is a party . . . is reserved to officers of the Department of Justice" does not apply to suits instituted by the S.E.C. because Section 21(e) of the Securities Exchange Act of 1934, 15 U.S.C. §78 (u)e, gives the S.E.C. the authority to "bring an action."

The district court, in the decisions just cited, interpreted the statute strictly and ruled that even though the S.E.C. has the authority to bring an action, it does not have the authority to prosecute the action after it has been filed since that authority is reserved to the Department of Justice. The Court of Appeals reversed, relying not on matters of statutory construction but on what it perceived to be the will of Congress as expressed in the testimony at a Congressional hearing. In the decision of which review is sought here, the Court of Appeals refused to overrule that determination. The question thus presented is one of obvious importance which has never been passed upon by this Court and which this Court is well equipped to decide. It is appropriate to add that the numerous abuses of prosecutorial discretion which occurred in this lawsuit would not be likely to have happened if the S.E.C.'s case had been conducted by an officer of the Department of Justice.

Another question presented in this petition for a writ of certiorari concerns Judge Ward's handling of certain discovery matters. As Moore's *Federal Practice* states:

> "Discovery orders are virtually non-reviewable by ordinary process. [footnote omitted]. Yet their impact on litigants is so severe that the courts have tolerated impermissive devices for securing review.

> [footnote omitted] and at least one very responsible voice, deploring these devices, has made the unacceptable suggestion that a very common form of discovery order should be regarded as appealable as a final judgment. *Southern Ry. v. Lanham*, 408 F.2d 348 (5th Cir. 1969) (Brown, J., dissenting from denial of motion for rehearing in banc.)." 9 Moore, *Federal Practice* ¶110.28

Thus, there is some authority for the proposition that certain types of discovery orders are appealable. A protective order and an order staying discovery can be viewed as orders granting an injunction and therefore are appealable. Moreover, in the case presented here, the petitioner sought review not of a discovery order in isolation but of a series of orders which happened to include discovery orders. See *General Motors Corp. v. City of New York*, 501 F.2d 639, 648 (2d Cir. 1974). As Moore's *Federal Practice* states:

> "Once a timely appeal is taken from an order made appealable by statute, the power of a court of appeals should be plenary to the extent that it chooses to exercise it." 9 Moore, *Federal Practice* ¶110.25[1].

In the case presented here, Judge Ward granted a protective order as to certain interrogatories and later stayed all defendant's discovery until the defendant had purged his contempt. In addition, he refused to dismiss the action even though the summons and complaint had never been served by the U.S. Marshal as required by Rule 4(c) Fed. R. Civ. P. and even though no affidavit of service or answer waiving the jurisdictional requirement of service had been filed. It is submitted that Judge Ward's actions in the context of this case present important questions which should have been reviewed by the Court of Appeals and ought to be reviewed by this Court by way of certiorari.

Finally, the petitioner seeks review of the Court of Appeals determination that an order denying a motion to enjoin the S.E.C. from "harassment and annoyance of the

defendant herein" is not appealable. The Court of Appeals reasoned in a rather obscure manner that Sloan's request for an injunction was "more in the nature of a request for a protective order" and hence was not appealable. This was clearly not the case and it is submitted that the question presented ought to be reviewed by way of certiorari.

CONCLUSION

For all of the reasons set forth above, this petition for a writ of certiorari should be granted.

Dated: January 2, 1977

SAMUEL H. SLOAN
1761 Eastburn Ave. Apt. A5
Bronx, N.Y. 10457
(212) 299-2095

APPENDIX "A"
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MAY 10, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 776—September Term, 1975.

(Argued April 27, 1976 Decided May 10, 1976.)

Docket No. 75-6106

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

—against—

SAMUEL H. SLOAN, individually and d/b/a
SAMUEL H. SLOAN & Co.,

Defendants-Appellants.

Before:

LUMBARD, WATERMAN and FEINBERG,
Circuit Judges.

Appeal from various orders of United States District Court for the Southern District of New York, Robert J. Ward, *J.*, entered in course of suit to enjoin violations of SEC rules.

Affirmed in part, dismissed in part.

SAMUEL H. SLOAN, Pro Se, Lynchburg, Virginia,
for Defendants-Appellants.

MICHAEL J. STEWART, Assistant General Counsel, Securities and Exchange Commission, Washington, D.C. (Thomas L. Taylor, III, Attorney, on the brief), *for Plaintiff-Appellee.*

PER CURIAM:

Samuel Sloan, a securities broker-dealer who is a frequent litigant in this court, see *Sloan* v. *SEC,* slip op. 2377, 2379 & nn. 2, 3 (2d Cir. March 4, 1976), and cases there cited, appeals from a number of orders of the United States District Court for the Southern District of New York, Robert J. Ward, *J.*, entered in the course of a continuing lawsuit in which the Securities and Exchange Commission (SEC) seeks to enjoin him from violation of various SEC rules requiring maintenance of proper books and records and making them accessible for inspection by SEC officials.[1] We affirm in part and dismiss in part.

The most significant order challenged by Sloan on this appeal, to which he devotes most of his lengthy brief, is an order dated September 3, 1975 holding him in civil contempt for failing to comply with a preliminary injunction granted by Judge Ward on January 17, 1975.[2] The injunction required Sloan, among other things, "to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of [his] books and records." An appeal from this

1 This is not the first such action taken by the SEC against Sloan. See *SEC* v. *Sloan*, 369 F. Supp. 996 (S.D.N.Y. 1974), appeal dismissed, Dkt. No. 74-1436 (2d Cir. Jan. 7, 1976).

2 The September 3 order adjudged Sloan in civil contempt and gave him 20 days to purge himself. When he did not, a further order of civil contempt was entered on September 26, 1975 ordering Sloan's arrest.

injunction was dismissed by this court on January 7, 1976. *SEC* v. *Sloan,* Dkt. No. 75-7056.[3]

The order from which Sloan now seeks to appeal is both in form and in substance an order of civil contempt. An order of civil contempt against a party to the litigation is not an appealable final order. 9 Moore, Federal Practice ¶ 110.13[4]. Moreover, after filing and briefing this appeal, Sloan purged himself of contempt, and on February 4, 1976, Judge Ward entered an order to this effect. Thus, no live controversy remains as to any of the alleged errors in the contempt adjudication, and the appeal from the order of contempt is moot.

Sloan also argues that the district court's refusal to dismiss the SEC's complaint on various grounds, and the grant to the SEC of a protective order as to certain interrogatories, were erroneous. Neither is an appealable final order. 9 Moore, Federal Practice ¶ 110.08[1] at n.33 and cases there cited: *UAW* v. *National Caucus of Labor Committees*, 525 F.2d 323, 324 (2d Cir. 1975), and cases there cited. Moreover, Sloan's notice of appeal does not refer to the protective order, dated August 4, 1975. These aspects of the appeal are therefore dismissed for lack of jurisdiction.

Another ruling appealed from is Judge Ward's refusal to hold the SEC in contempt for allegedly violating an oral order restricting the parties' press releases. Assuming that such an order is appealable at all, we note that the district judge found that the particular press release that was the subject of Sloan's motion did not violate his order. We see no basis for substituting our judgment for that of the district judge in interpreting his own order.

3 We cited *United States* v. *Sperling*, 506 F.2d 1323, 1345 n.33 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975).

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We also affirm Judge Ward's refusal to disqualify and disbar counsel for the SEC. While such an order is appealable, *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (en banc), we have held that the supervision of attorneys is a matter primarily for the district court, whose findings will be upset only on a showing of abuse of discretion. *Hull* v. *Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975). We see no abuse of discretion here. Sloan also argues that the SEC attorneys should be disqualified because the SEC lacks authority to prosecute actions on its own behalf, and that *SEC* v. *Robert Collier & Co.*, 76 F.2d 939 (2d Cir. 1935), which holds that it has such authority, should be overruled. We see no sufficient reason to overturn a persuasive decision by a distinguished bench.

Finally, Sloan appeals from the denial of his motion to enjoin the SEC from "harrassment and annoyance of the defendant herein." Sloan apparently would have us treat this motion as in effect a complaint or counterclaim charging violations of his constitutional rights, and seeking a preliminary injunction. On that theory, the order denying the injunction would be appealable. 28 U.S.C. § 1292(a)(1). Moreover, such a denial would have required findings of fact and conclusions of law under F.R. Civ. P. 52(a), which were not made by the district court. On the other hand, the papers do not purport to be pleadings, and in the circumstances of this litigation, the district judge apparently considered the motion as one addressed to "the district court's power to control the proceedings before it," 9 Moore, Federal Practice ¶ 110.19[1] at 207-08, and thus not a request for an injunction governed by the Rule and statute cited above. We agree that the motion here was more in the nature of a request for a protective order.

The order denying it is therefore interlocutory and non-appealable.

Accordingly, as indicated above, the appeal is dismissed as to certain of the rulings appealed from; in all other respects, the rulings of the district court are affirmed.

APPENDIX "B"
ORDER DATED DECEMBER 6, 1976 DENYING PETITION FOR REHEARING

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of December, one thousand nine hundred and seventy-six.

Present:

HON. J. EDWARD LUMBARD
HON. STERRY R. WATERMAN
HON. WILFRED FEINBERG
Circuit Judges

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

SAMUEL H. SLOAN,

Defendant-Appellant.

A petition for a rehearing having been filed herein by appellant pro-se,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

s/A. Daniel Fusaro
A. DANIEL FUSARO Clerk

APPENDIX "C"
ORDER DATED DECEMBER 6, 1976 DENYING SUGGESTION THAT THE REHEARING BE EN BANC

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of December, one thousand nine hundred and seventy-six.

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

SAMUEL H. SLOAN,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard en banc, filed June 3, 1976 and supplemented by a letter dated October 18, 1976 having been filed herein by appellant Pro Se, SAMUEL H. SLOAN, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

APPENDIX "D"
LETTER DATED OCTOBER 18, 1976
FROM SAMUEL H. SLOAN TO THREE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT .

October 18, 1976

Hon. J. Edward Lombard
Hon. Sterry R. Waterman
Hon. Wilfred Feinberg
U.S. Court of Appeals
U.S. Courthouse
Foley Square
New York, New York 10007

Re: *S.E.C. v. Sloan*
Dkt. No. 75-6106

Dear Honorable Sirs:

On May 10, 1976 you dismissed as moot my appeal from an order adjudging me to be in contempt of court. See *S.E.C. v. Sloan*, 535 F. 2d 679, 680 (2d Cir. 1976). I thereafter filed a petition for a rehearing accompanied by a suggestion that the rehearing be en banc, which petition is still pending.

Since then, the S.E.C. has briefed and argued another appeal, *Sloan v. S.E.C.*, Dkt. No. 75-4087, argued October 13, 1976 before Medina, Anderson and Gurfein, CCJ. That is an appeal from an administrative order of the S.E.C. revoking my broker dealer registration and barring me for life from being associated with any broker or dealer.

During the oral argument of that appeal, counsel for the S.E.C. expressly stated that the Court of Appeals should consider the adjudication by the District Court that I was in

contempt of court as a basis for upholding the decision of the S.E.C. revoking my broker dealer registration, etc. At that point, I believe the S.E.C. is foreclosed from arguing that the question of the validity of the contempt adjudication is moot. In other words, the S.E.C. cannot have it both ways, claiming for the purpose of defeating my right to appeal in 75-6106 that the case is moot and yet claiming for the purpose of prevailing in 75-4087 that the contempt adjudication is a proper factor for this Court to consider.

The decision of the United States Supreme Court in *Sibron v. New York*, 392 U.S. 40, 57 (1968) clearly establishes the correctness of the point I am making. There, the Supreme Court held that an appeal does not become moot unless there is no possibility that a collateral legal consequence will arise as a result of the order from which the appeal is taken. Clearly, a possible collateral legal consequence has arisen here since the S.E.C. has argued that on the basis of the contempt adjudication, I should be barred for life from being associated with any broker or dealer.

I realize that the judges on the panel in the instant case were not in the courtroom on October 13, 1976 and therefore did not hear the attorney for the S.E.C. when he argued this point. However, I believe the Clerk of this Court keeps a tape recording of all oral arguments for the benefit of the judges of this Court and therefore it can be readily determined by you that what I am stating is correct.

For this reason, in addition to reasons previously stated, I believe that my petition for a rehearing should be granted and the question of the validity of the contempt adjudication should be decided on the merits.

Very truly yours,

s/Samuel H. Sloan
Samuel H. Sloan

APPENDIX "E"
COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

-against-

SAMUEL H. SLOAN, Individually and
d/b/a SAMUEL H. SLOAN & CO.

Defendants.

Plaintiff, Securities and Exchange Commission ("Commission"), for its complaint herein alleges as follows:

1. Defendants Samuel H. Sloan ("Sloan") individually and doing business as Samuel H. Sloan & Co. ("Sloan & Co.") have engaged, are engaged and are about to engage in acts and practices which constitute and will constitute violations of Sections 15(c)(2), and 17(a) of the Securities Exchange Act of 1934 ("Exchange Act"), as amended, 15 U.S.C. 78o(c)(2) and 15 U.S.C. 78q(a) and Rules 17 CFR 240.15c2-11 ("Initiating Quotations in Over-the-Counter Securities"), 17 CFR 240.17a-4 ("Examination and Visitation Provisions").

2. The Commission brings this action pursuant to

authority conferred by Section 21(e) of the Exchange Act, 15 U.S.C. 78u(e).

3. This Court has jurisdiction under Section 27 of the Exchange Act, 15 U.S.C. 78aa.

4. The Commission, pursuant to the authority contained in Sections 15(c), 17(a) and 23(a) of the Exchange Act, 15 U.S.C. 78o(c), 15 U.S.C. 78q(a) and 15 U.S.C. 78w(a), has prescribed Rules 17 CFR 240.15c2-11, 17 CFR 240.17a-4 which are now and at all times herein relevant, were in effect.

5. Defendant Sloan & Co. is a sole proprietorship which maintains its principal place of business at 120 Liberty Street, New York, New York.

6. Defendant Sloan & Co. is registered with the Commission pursuant to the provisions of Section 15(b) of the Exchange Act, 15 U.S.C. 78o(b) as a broker and dealer in securities and has been so registered since May 10, 1970.

7. Defendant Sloan is and at all times herein relevant was the sole proprietor and manager of Sloan & Co. He resides at 1761 Eastburn Avenue, Bronx, New York.

FIRST CAUSE OF ACTION

(Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rule 17a-4 thereunder, 17 CFR 240.17a-4 ("Examination and Visitation Provisions)

8. The Commission realleges and incorporates by reference each and every allegation set forth in paragraphs 1 through 7 hereof.

9. During the period from May 10, 1970, to the date hereof, the defendant Sloan & Co. has been and is now a broker and dealer in securities, engaged in the business of

effecting transactions for the accounts of others and for its own account and during the period has been and is now making use of the mails and means and instrumentalities of interstate commerce to effect transactions in and to induce the purchase and sale of securities (other than an exempted security or commercial paper, bankers' acceptances or commercial bills) otherwise than on a national securities exchange in the Southern District of New York and elsewhere.

10. During the period from on or about December 26, 1974, to the date hereof, defendants Sloan and Sloan & Co. have violated Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rule 17 CFR 240. 17a-4 in that said defendants have refused to produce for examination and maintain in an easily accessible place their books and records.

SECOND CAUSE OF ACTION

(Section 15(c)(2) of the Exchange Act, 15 U.S.C. 78o(c)(2) and Rule 15c2-11 thereunder, 17 CFR 240.15c2-11 ("Provision for Initiating Over-the-Counter Quotations")

11. The Commission realleges and incorporates by reference each and every allegation set forth in paragraphs 1 through 10 hereof.

12. During the period from on or about December 23, 1974, to the date hereof, defendants Sloan and Sloan & Co. have violated Section 15(c)(2) of the Exchange Act, 15 U.S.C. 78o(c)(2) and Rule 17 CFR 240.15c2-11, thereunder, in that said defendants have submitted for publication and have caused the publication of quotations in a quotation medium for over-the-counter securities while and at a time said defendants failed to possess, maintain, preserve or make reasonably available upon request to any person expressing an interest in a proposed transaction in

the security being quoted, and/or member of the plaintiff Commission's staff those items of information required to be in the possession of a broker-dealer before a broker-dealer may lawfully publish any such quotation as required by Rule 17 CFR 240.15c2-11 (a)(4) and (c).

REQUEST FOR RELIEF

13. The Commission repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 12 hereof.

14. By reason of defendants Sloan and Sloan & Co.'s disregard of Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rule 17a-4, 17 CFR 240.17a-4 promulgated thereunder, which requires that registered brokers and dealers produce for examination and maintain in an easily accessible place their books and records, the Commission cannot determine whether Sloan is in compliance with various sections and rules of the federal securities laws as well as an Order of Permanent Injunction issued in January 1974, against the defendants.

15. By reason of defendants Sloan and Sloan & Co.'s violation of Section 15(c)(2) and Rule 15c2-11 thereunder, 17 CFR 240.15c2-11, which requires that registered brokers and dealers possess, furnish, maintain, preserve certain information prior to submitting for publication quotations in a quotation media for certain over-the-counter securities, they have created a market in securities without adequate and current information.

WHEREFORE, plaintiff respectfully demands:

1. That a Temporary Restraining Order, a Preliminary Injunction and a Permanent Injunction be entered by the Court restraining and enjoining Sloan and Sloan & CO., their agents, servants, employees, attorneys, successors and assigns, and those persons in active concert or participation with them (or any member or dealer registered

with the Commission of which defendant Sloan may become a principal or controlling person):

1. From further violations of the examination provisions of Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rule 17a-4 promulgated thereunder, 17 CFR 240.17a-4;

2. From removing, destroying or altering the books and records of Sloan and Sloan & Co. required to be made, maintained and preserved pursuant to Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rules 17a-3 and 17a-4 promulgated thereunder, 17 CFR 240.17a-3 and 17a-4.

II. That a Mandatory Order be issued by the Court to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Sloan and Sloan & Co. (or any other broker or dealer registered with the Commission of which defendant Sloan may become a principal or controlling person) as required by Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rule 17a-4 promulgated thereunder, 17 CFR 240.17a-4.

III. That a Temporary Restraining Order, a Preliminary Injunction and a Permanent Injunction be entered by the Court restraining and enjoining defendants Sloan and Sloan & Co., their agents, servants, employees, attorneys, successors and assigns, and those persons in active concert or participation with them (or any member or dealer registered with the Commission of which defendant Sloan may become a principal or controlling person), while and at a time said defendants failed to possess, maintain, preserve or make reasonably available upon request to any person expressing an interest in a proposed transaction in the security being quoted, and/or member of the plaintiff Commission's staff those items of information required to be in the possession of a broker-dealer before a broker-

dealer may lawfully publish any such quotation as required by Rule 17 CFR 240.15c2-11(a)(4) and (c).

IV. Such other and further relief as this Court may deem necessary and proper.

Respectfully submitted,

s/Donald N. Malawsky
DONALD N. MALAWSKY
Associate Regional Administrator
Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
26 Federal Plaza
New York, New York 10007
Telephone No.: (212) 264-1634

Of Counsel
William Nortman
Thomas R. Beirne
Jerome M. Selvers

Dated: New York, New York
December 30, 1974

APPENDIX "F"
AFFIDAVIT OF NOTICE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

-against-

SAMUEL H. SLOAN, Individually and
d/b/a SAMUEL H. SLOAN & CO.

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JEROME M. SELVERS, being duly sworn, deposes and says:

1. I am an attorney employed in the New York Regional Office by the Plaintiff, Securities and Exchange Commission ("Commission").

2. At approximately 3:10 p.m. on Monday, December 30, 1974 I called defendant Samuel H. Sloan, at telephone number 583-8565 and advised him that an action had been filed by the Commission and that in connection therewith, an application was being presented to Judge Ward for a temporary restraining order brought on by an Order to Show Cause. I further advised Mr. Sloan that said application would be heard by Judge Ward in his chambers in Room 511 at 3:45 P.M. on December 30, 1974.

s/Jerome M. Selvers
JEROME M. SELVERS

Sworn to
December 30, 1974

APPENDIX "G"
AFFIDAVIT OF THOMAS J. DOLAN IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

-against-

SAMUEL H. SLOAN, Individually and d/b/a SAMUEL H. SLOAN & CO.

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

THOMAS F. DOLAN, being duly sworn, deposes and says:

1. I am employed by the United States Securities and Exchange Commission ("Commission"), plaintiff in the above entitled action, in its New York Regional Office as a Securities Compliance Examiner.

2. I make this affidavit in support of the application of the Commission for an Order to Show Cause, Temporary Restraining Order and Motion for Preliminary Injunction against Samuel H. Sloan ("Sloan"), individually and doing business as Samuel H. Sloan & Co., ("Sloan & Co.").

3. This affidavit is based upon correspondence and other documents of defendant Sloan & Co., statements made to or in my presence by Sloan, information received from the NQB, information contained in the official files of the Commission and upon information and belief.

4. Defendant Sloan & Co., a sole proprietorship, has its principal place of business at 120 Liberty Street, New York, N.Y.; however, maintains its books and records at 1761 Eastburn Avenue in the Bronx, N.Y. Defendant Sloan & Co. is registered with the Commission pursuant to the provisions of Section 15(b) of the Exchange Act, 15 U.S.C. 78o(b), as a broker and dealer in securities and has been so registered since May 10, 1970.

5. Defendant Sloan resides at 1761 Eastburn Avenue, Bronx, New York, and at all times relevant hereto, is and has been sole proprietor and manager of defendant Sloan & Co.

6. Sloan was advised both by letter and telephone that members of the staff would examine his books and records on Thursday, December 26, 1974.

VIOLATIONS OF SECTION 17(a) OF THE EXCHANGE ACT, 15 U.S.C. 78q(a) AND RULE 17a-4 THEREUNDER, 17 CFR 240. 17a-4 (EXAMINATION AND VISITATION PROVISIONS)

7. On December 26, 1974 I was instructed to make an examination of the books and records of defendant Sloan & Co. at 1761 Eastburn Avenue, Bronx, N.Y. I was accompanied by Mr. Ira Spindler ("Spindler"). However, after informing Sloan that we were to examine his books and records, Sloan refused to produce the same. I advised Sloan that he was required to maintain his books and records in an easily accessible place as well as required to make them available for examination by members of the

staff of the Commission. Moreover, I personally gave Sloan a copy of Section 17(a) of the Securities Exchange Act of 1934 and Rule 17a-4 promulgated thereunder. However, Sloan remained adamant in his refusal to allow us to examine his books and records.

8. Sloan informed us that his books and records were easily accessible to him but not to the Commission.

9. I asked Sloan if he was aware of the fact that he was personally enjoined by an Order of this Court for future violations of Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 promulgated thereunder. He replied that he was aware of the injunction but felt that his conduct was not violative of the same.

10. I asked Sloan if it was his intention to refuse examination of his books and records both at 120 Liberty Street and at Lynchburg, Virginia. He advised me that no books and records were maintained at 120 Liberty Street but that he would not allow an examination of his books and records in Lynchburg, Virginia.

NEED FOR RELIEF

11. Defendant Sloan & Co., is in violation of the bookkeeping provisions of the Exchange Act. By virtue of the fact that Sloan has refused to allow an examination of his books and records, it is impossible to determine whether the firm was in compliance with various other provisions of the federal securities laws.

12. For the reasons stated above, a clear and specific showing has been made as required by Rule 9(c)(4) of the General Rules of this Court that it is necessary for the Commission to proceed by Order to Show Cause rather than by Notice of Motion, to seek a Temporary Restraining Order and Preliminary Injunction restraining and enjoining the defendants from further violations of the Exchange Act as alleged in the Complaint filed herein.

13. No previous request of this relief has been made to this Court or any Judge thereof, based on the facts complained of herein.

s/Thomas F. Dolan
THOMAS F. DOLAN

Sworn to
December 30th, 1974

APPENDIX "H"
NOTICE OF MOTION TO ADJUDGE THE DEFENDANT IN CONTEMPT OF COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

SAMUEL H. SLOAN, individuall and d/b/a SAMUEL H. SLOAN & CO.

Defendants.

PLEASE TAKE NOTICE that upon the annexed affidavit of Ira B. Spindler, the plaintiff Securities and Exchange Commission will move this Court on April 1, 1975 at 2:15 p.m. or as soon thereafter as the matter may be heard at the United States Courthouse, New York, New York, to adjudge the defendant in contempt of this Court for wilful violations of its order of injunction dated January 17, 1975, and to impose such remedial sanctions as this Court may deem appropriate to compel compliance with that order.

Respectfully submitted

s/William D. Moran
WILLIAM D. MORAN
Regional Administrator
Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
26 Federal Plaza
New York, N.Y. 10007
Tel. No. (212) 264-1636

Of Counsel
William Nortman
New York Regional Office

Thomas L. Taylor III
Washington, D.C.

Dated: New York, New York
March 24, 1975

APPENDIX "I"
AFFIDAVIT OF IRA B. SPINDLER
IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

-against-

SAMUEL H. SLOAN, individually and
d/b/a SAMUEL H. SLOAN & CO.

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

IRA B. SPINDLER, being duly sworn, deposes and says:

1. I am employed by the United States Securities and Exchange Commission ("Commission"), plaintiff in the above-entitled action, in its New York Regional Office as a financial analyst in the Branch of Market Surveillance, which exercises regulatory responsibilities with respect to trading in the over-the-counter markets.

2. I make this affidavit in support of the Commission's Application for a Contempt citation and its response to the defendant Samuel H. Sloan's motion for an injunction against harassment by the Commission.

3. This affidavit is based upon my personal knowledge of

the facts, correspondence and other documents contained in the files of the Commission, information received from the National Quotation Bureau ("NQB"), information contained in the pleadings, affidavits and transcript of hearings in this action, discussions with various staff members of the Commission, and upon information and belief.

4. In a prior action entitled *Securities and Exchange Commission v. Samuel H. Sloan and Samuel H. Sloan & Co.*, No. 71 Civil 2695, this Court on January 22, 1974 entered a judgment permanently enjoining those defendants from further violations of Section 15(c)(3) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(c)(3), and the net capital rule thereunder. The judgment further permanently enjoined the defendants from violations of Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and the bookkeeping rules thereunder. On March 11, 1974, defendant Sloan filed a notice of appeal from this order and moved the United States Court of Appeals for the Second Circuit to stay the effectiveness of that judgment pending appeal. The Court of Appeals denied that stay on October 29, 1974.

5. On November 6, 1974, defendant Sloan sent a letter to the Commission stating that "it is my intention to resume activity as a dealer in over-the-counter securities forthwith." The letter further advised that some of Sloan's books and records were located at 1761 Eastburn Avenue, Bronx, New York but that he would not permit any "officer or employee of the Securities and Exchange Commission to enter my personal residence for any purpose" unless a valid search warrant were produced. Sloan's November 6 letter is attached hereto as Exhibit 1.

6. In December, 1974 I received information from the NQB indicating that Mr. Sloan was submitting, as a broker-dealer, quotations for publication in the pink sheets while not in possession of current financial or other in-

formation with respect to the companies for which he sought to enter quotations as required by Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rule 15c2-11 thereunder, 17 C.F.R. 240.15c2-11. On December 18, 1974 I telephoned Mr. Sloan and informed him that any quotations published for these companies would not comply with the Commission's rules. Sloan stated that it was his intention to wilfully violate Rule 15c2-11 with regard to these issues and that he also intended to publish quotations for at least 93 other companies for which current information was not available.

7. In view of Mr. Sloan's expressed intention to conduct business as a broker-dealer while not permitting the Commission access to his books and records and his expressed intention to violate Rule 15c2-11, the Commission filed its complaint in the instant action seeking a temporary restraining order and a preliminary and permanent injunction against Sloan from violating Section 17(a) of the Exchange Act and the quotations initiation rule (Rule 15c2-11 thereunder). The complaint also sought a mandatory order requiring Sloan to permit immediate examination of the books and records of Sloan and Sloan & Co. in an easily accessible place by representatives of the Commission.

8. On December 30, 1974, Judge Robert J. Ward endorsed an order to show cause why a preliminary injunction should not be granted as requested by the Commission and entered an order temporarily restraining Sloan from violating Rule 15c2-11 and directing him to permit immediate examination in an easily accessible place of the books and records of Sloan and Sloan & Co. A copy of this order was personally served upon the defendant on December 30, 1974. On January 8, 1975, Judge Thomas F. Griesa endorsed an order extending the temporary restraining order to and including January 17, 1975.

9. On January 17, 1975, after an evidentiary hearing,

Judge Ward entered an order of injunction which granted all the relief sought by the Commission including a mandatory order requiring Sloan to permit an immediate inspection of his books and records by representatives of the Commission. That order of injunction was personally served upon Mr. Sloan in open court. (Transcript of Proceedings, January 17, 1975, p. 86).

10. On February 26, 1975, at approximately 9:15 a.m., Ralph Pernick, a staff member of the New York Regional Office, telephoned Sloan at 212-583-8586. Pernick identified himself, stated that he worked for the Securities and Exchange Commission, and asked Sloan what time during the following week would be convenient for Sloan for an examination of the books and records of Sloan & Co. by representatives of the Commission. Sloan replied that no time during that week would be convenient and that he was "not particularly inclined to cooperate" with the Commission.

11. Sloan then asked Pernick what books and records he would want to see. Pernick stated that the staff wanted to examine various books and records, including capital computations, to determine if Sloan & Co. was in compliance with the net capital rule, among others. Pernick then stated that in view of Sloan's statement that he was "not particularly inclined to cooperate" with the Commission, it appeared that Sloan had not yet decided whether he would permit such an inspection. Pernick then asked Sloan when the latter would make up his mind.

12. Sloan then stated that he would not let examiners of the Commission inspect the books and records of Sloan & Co.

13. A letter memorializing this conversation was mailed to Sloan on February 27, 1975 (a copy of this letter and the return receipt are attached as Exhibit 2. Inexplicably, after the Commission received the return receipt, the letter was returned unclaimed to the Commission). The letter

specifically stated that at 10:00 a.m., March 5, 1975, two representatives of the Commission would arrive at Sloan's apartment at 1761 Eastburn Avenue, Bronx, New York[1] to conduct such an examination.

14. At 10:00 a.m., March 5, 1975, I arrived at Sloan's apartment at 1761 Eastburn Avenue, Bronx, New York accompanied by Thomas Dolan, a securities compliance examiner in the Commission's New York Regional Office. Although we knocked on the door, which was partially open when we arrived, there was no reply or response from inside the apartment. I then telephoned Sloan's apartment.

15. A woman, later identified as Palina Kristjansdottir, answered the telephone. I gave my name, identified myself as an employee of the Commission, and asked if I had reached the apartment of Samuel Sloan. She replied that it was Sloan's apartment, but that Sloan was not in the apartment and that she did not know where he was, nor where he could be contacted, nor when he would return. I then told her that another representative of the Commission was waiting in the hallway outside the door to Sloan's apartment, and that the two of us were there to inspect the books and records of Sloan & Co.

16. The Commission never received any communication from Sloan which indicated that Sloan could not or would not be at his apartment at 10:00 a.m., on March 5, 1975.

17. I rejoined Dolan in the hallway outside Sloan's apartment. At no time did Mr. Dolan or I enter Sloan's apartment. Kristjansdottir came to the door. Dolan told her his name, identified himself as an employee of the Commission, and said that he and I wanted to examine the books and records of Sloan & Co. Kristjansdottir told us that Sloan was not there and that he had not left any instructions. Upon hearing this, we left.

18. On March 6, 1975, at approximately 10:00 a.m., I returned to Sloan's apartment. I saw Kristjansdottir leaving Sloan's apartment. She saw me and told me that she had

not seen or heard from Sloan since Dolan and I had left the apartment house the previous day. Upon hearing this, I immediately left.

19. Sloan has published quotations in the pink sheets for various securities as recently as March 21, 1975. Exhibit 3 is a copy of several quotations published in the pink sheets for Sloan within the past month. These quotations are typical ones for the relevant period. Each listing, whether or not accompanied by a bid or asked quotation, also includes the telephone numbers of Sloan's Bronx apartment or his hospital room in Plattsburgh, New York.

20. Sloan and Sloan & Co. have continually refused to act in accordance with the injunction entered against them in this action. Their acts are consistent with Sloan's repeated statements that he will not conduct himself according to the statutes and rules applicable to all broker-dealers. By submitting quotations in the pink sheets, Sloan is acting as a broker-dealer. Nevertheless, he has failed utterly to comply with the laws applicable to broker-dealers. Although two months have passed since Sloan was ordered to permit an immediate examination of his books and records, Sloan still refuses to allow such an examination. As a result, the Commission has been unable to obtain the relief granted by this Court.

s/Ira B. Splindler
IRA B. SPLINDLER

Sworn to
March 2[illegible]th, 1975

1. Sloan stated on the record that his books and records were kept in his apartment (Transcript of Proceedings, December 30, 1974, pages 12-13, 25). His letter to the Commission dated November 6, 1975 repeats this assertion (Exhibit 1).

APPENDIX "J"
AFFIDAVIT OF SERVICE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

SAMUEL H. SLOAN, Individually and
d/b/a SAMUEL H. SLOAN & CO.

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

WILLIAM NORTMAN, being duly sworn, deposes and says:

1. I am over 21 years of age and am employed as an attorney by the Securities and Exchange Commission in its New York Regional Office. I am not a party to this action.

2. On March 24, 1975, I served a copy of the Commission's Response of the Commission to Defendants' Motion for Injunction against Harassment, Notice of Cross-Motion and Affidavit in Support Thereof, and the Memorandum in Support of the Commission's Motion for a Contempt Citation Against Sloan and Sloan & Co., and in Opposition to Defendants' Motion for an Injunction, upon Samuel H. Sloan and Samuel H. Sloan & Co. by depositing true copies of same in postpaid envelopes in an

official depository under the exclusive care and custody of the United States Postal Service, addressed to the following locations:

1. Samuel H. Sloan, 120 Liberty Street, New York, New York 10006

2. Samuel H. Sloan, 1761 Eastburn Avenue, Bronx, New York.

3. Samuel H. Sloan, c/o 917 Old Trent's Ferry Road, Lynchburg, Virginia.

4. Samuel H. Sloan, Champlain Valley Physicians Hospital Medical Center, Plattsburgh, New York

s/William Nortman
WILLIAM NORTMAN

Sworn to
March 25th, 1975

APPENDIX "K"
LETTER DATED MARCH 25, 1975
FROM SAMUEL H. SLOAN

917 Old Trent's Ferry Road
Lynchburg, Virginia 24503
March 25, 1975
Phone: 804-384-1207

Clerk
U.S. Court of Appeals
U.S. Courthouse
Foley Square
New York, New York

Dear Sir:

I presently have pending a number of appeals in your court: *S.E.C. v. Sloan & Co.*, 74-1436, *S.E.C. v. Canadian Javelin Ltd.* 75-7046, Sloan v. S.E.C. 73-5[illegible]7, *S.E.C. v. Sloan* 75-7056, *Sloan v. Canadian Javelin Ltd.* 75-7096-7, and a recent appeal entitled *Sloan v. S.E.C. et al.*, to which no docket number has yet been assigned.

On March 9, 1975, while traveling on Highway 11 near Champlain, N.Y., Highway 87, and the Canadian border, the car I was driving broke down. While attempting to flag a passing automobile, I was struck, and both of my legs were broken below the knees. My doctor anticiaptes that, due to the nature of the fractures, it will be six months before I can again walk.

Presently, I am working on my briefs for the above encaptioned appeals. This is proving difficult, because I have no law books and I am forced to lie on my back at all times. However, in spite of these handicaps, I hope to have the briefs filed as soon as it is physically possible for me to do so.

The purpose of this letter is to inform you and my ad-

versaries of this state of affairs, and to ask your forebearance, in view of this situation. I also wish to inform you that during the period of my convalescence my address will be:

Samuel H. Sloan
917 Old Trent's Ferry Road
Lynchburg, Virginia 24503

Yours very truly,
s/Samuel H. Sloan
Samuel H. Sloan

SHS/ms
copies to
Securities & Exchange Commission
Hon. Robert J. Ward
Hon. Thomas P. Griesa

APPENDIX "L"
LETTER DATED APRIL 15, 1975
FROM DR. TERRANCE O. MILLER

PIEDMONT ORTHOPEDIC SURGERY, INC.

April 15, 1975

To whom it may concern:

Mr. Sloan was injured in an automobile accident on 3-9-75. He was initially treated in Plattsburgh, New York. He suffered displaced fractures of the bones of both lower extremities. The evening of the injury he underwent closed reduction of the fracture with application of casts and three pins were placed in the tibia on the left side. He was hospitalized until his transfer to Lynchburg, Virginia on 3-23-75. He was again hospitalized here on 4-3-75 and underwent repeat general anesthesia with manipulation with recasting of his legs.

He remains totally disabled, wheelchair bound and, of course, is in no medical condition to appear in court.

If further information is required, please contact me.

s/Sincerely,

s/Terry O. Miller, M.D.
TERRY O. MILLER, M.D.

TOM/sdf
cc: Mr. Sloan

APPENDIX "M"
DEFENDANTS FIRST INTERROGATORY
TO PLAINTIFF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES & EXCHANGE COMMISSION

Plaintiff,

-against-

SAMUEL H. SLOAN individually and
d/b/a SAMUEL H. SLOAN & CO.

Defendants.

Pursuant to Rule 33 of the Federal Rules of Civil Procedure defendants hereby demand that plaintiff furnish within 30 days of service hereof, separately and fully in writing under oath, an answer to the following interrogatories:

1. State separately each and every act and practice in which plaintiff contends the defendants have engaged, are engaged or are about to engage which constitute violations of Sections 15(c)(2) and 17(a) of the Securities Exchange Act of 1934 and Rules 17 CFR 240.15c2-11 and 17 CFR 240.17a-4 promulgated thereunder.

2. State whether any of the defendants are registered brokers or dealers with the Securities & Exchange Commission and whether a broker dealer withdrawal request has been filed and the date of said filing.

3. With respect to each and every quotation published in the pink sheets of the National Quotation Bureau Inc. at

the request of Samuel H. Sloan & Co. which plaintiff contends was in violation of Rule 17 CFR 240.15c 2-11, state the exact name of the issuer of security, the exact title and class of the security, the quotation published, whether it was a bid or an asked quotation, the date on which the quotation was published, whether the S.E.C. had ever suspended trading in that security and, if so, the dates when the suspension of trading commenced and terminated.

4. With respect to every quotation listed in item three above, state, by reference to the appropriate subsection of Rule 15 c 2-11, the manner in which this quotation was manipulative, fraudulent or deceptive.

5. With respect to every quotation listed in item three above, state the name or names of any brokers or dealers listed in the pink sheets under the same security either on the same date or on the dates immediately following and state whether the plaintiff has commenced either administrative or injunctive proceedings against said brokers and dealers for alleged violations of Rule 15c 2-11.

6. State the time and dates of all conversations by telephone and in person between Ira Spindler and the defendants and between Thomas Dolan and the defendants and state the substance of all such conversations.

7. State the time and date of each conversation by telephone and in person between Jerome Selvers and the defendants or their agents between December 30, 1974 and January 8, 1975 and state the substance of each conversation.

8. State whether plaintiff communicated with the firms of E. L. Aaron & Co. and Morton Kominsky regarding the listing in the pink sheets of Continental Dynamics Ltd. which was initiated by the defendants and state the nature of every such communication.

9. State whether sworn testimony was taken by plaintiff with regard to the matters referred to in item eight above

and state the time, date and place of such sworn testimony and the name of the person who testified.

10. State the name of each and every security suspended from trading by the plaintiff during 1973, 1974 and 1975 and the dates of each suspension.

11. State the full name, the residence address and the political party of each commissioner of the Securities & Exchange Commission and the date when appointed.

12. State any business, vocation or employment, other than that of serving as commissioner of each and every commissioner of the Securities & Exchange Commission.

13. State each and every purchase and sale of a security including the date, price and name of the security involved in the purchase and sale and each and every stock market transaction engaged in by each commissioner of the Securities & Exchange Commission during the period in which he has been a commissioner.

14. Describe, in a manner sufficient for a *subpoena duces tecum* or for production of documents pursuant to Rule 34 of the Federal Rules of Civil Procedure, all documents contained in the records and files of plaintiff including all transcripts, correspondence, memoranda, and work product concerning the examination and investigation by plaintiff of the defendants both prior to and during the course of this lawsuit.

Dated: June 11, 1975
Lynchburg, Virginia

s/Samuel H. Sloan
SAMUEL H. SLOAN
917 Old Trents Ferry Road
Lynchburg, Virginia 24503
(804) 384-1207

To: Securities & Exchange Commission
26 Federal Plaza
New York, New York 10007

APPENDIX "N"
NOTICE OF MOTION AND
DEMAND FOR JURY TRIAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

-against-

SAMUEL H. SLOAN, Individually and
d/b/a SAMUEL H. SLOAN & CO.

Defendants.

PLEASE TAKE NOTICE that upon the annexed affidavit of Samuel H. Sloan sworn to the 29th day of July, 1975 the undersigned will move this court on the 12th day of August, 1975 (1) for reargument of this court's decision of July 22, 1975 in which the undersigned was adjudged to be in contempt of court, (2) for a hearing and/or trial by jury on the motion for contempt and (3) for an order pursuant to 28 U.S.C. 144 and 28 U.S.C. 455 recusing the Hon. Robert J. Ward from proceeding further in this case or the grounds that he has demonstrated bias and prejudice against the pro se defendant and that, by virtue of his conduct in this case, he has demonstrated his lack of regard for the oath prescribed by 28 U.S.C. 453 and his unfitness to be a judge of the United States District Court, (4) in the event that parts (1), (2) and (3) of this motion are denied for leave pursuant to 28 U.S.C. 1292(b) from that part of the decision and

order of this court which is interlocutory in character and (5) for a stay pursuant to Rule 8(a) R. App. P.

Dated: Lynchburg, Virginia
July 28, 1975

Yours, etc.

s/Samuel H. Sloan
Samuel H. Sloan
917 Old Trents Ferru Road
Lynchburg, Virginia 24503
(804) 384-1207

To: Securities & Exchange Commission
26 Federal Plaza
New York, N.Y.

APPENDIX "O"
AFFIDAVIT OF SAMUEL H. SLOAN
IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

-against-

SAMUEL H. SLOAN, Individually and
d/b/a SAMUEL H. SLOAN & CO.

Defendants.

COMMONWEALTH OF VIRGINIA)
CITY OF LYNCHBURG) ss.:

SAMUEL H. SLOAN, being duly sworn, deposes and says:

1. On July 22, 1975 this Court adjudged me to be in contempt of court and ordered that my books and records be removed to a place where they may be inspected by representatives of the Securities & Exchange Commission. ("S.E.C."). I now ask for reargument on this motion.

2. As far as I am aware the S.E.C. has no interest in examining my books and records. If they have such an interest, they have not communicated it to me. On July 25, 1975, the day I received the decision of this court in the mail, I called S.E.C. staff attorney Thomas L. Taylor, III and asked if and when the S.E.C. would be coming to

inspect my books and records. Mr. Taylor replied that the S.E.C. had no plans to do so. He indicated that he thought that under the circumstances the court would direct the U.S. Marshal to come to Lynchburg and get my books and records. It should be noted, incidentally, that all of the attorneys who originally expressed an interest in examining my books and records and who instituted this lawsuit are no longer employed by the New York Regional Office of the S.E.C.

3. Several months ago I inquired of Mr. Taylor as to whether the motion for contempt had been decided. He told me that he did not expect that the motion for contempt would ever be decided by the court since the S.E.C. had not proceeded via an order to show cause. He stated that the S.E.C. had merely brought this motion for the purpose of having it before the court in case the S.E.C. wanted a decision at some time in the future.

4. In any event, it is apparent that the S.E.C. has no present interest in examining my books and records. This, in part, provided the basis for my motion to dismiss this proceeding as moot. It is submitted that this court was in error and that my motion to dismiss should have been granted.

5. Furthermore, at no time has the S.E.C. desired to have any books and records removed to a place where they could be inspected by the S.E.C. This has come up in connection with the previous lawsuit. In August and September, 1973, my then attorney, Robert W. Taylor, called the S.E.C. and offered to turn over all of my books and records to the S.E.C. This offer was refused by the S.E.C. The S.E.C. stated that it was not willing to act as a storehouse for the books and records of brokers and dealers. Instead, the S.E.C. wanted to be able to examine my books and records with me present. This was impossible because I was in Europe at the time although my books and records were readily available to the S.E.C. at my office at 11 Broadway, New York, N.Y. The point

remains, however, that the S.E.C. is not interested in the removal of my books and records and did not request this relief in the ad damnum of its complaint.

6. In connection with this motion, I am requesting a jury trial. Since it appears that this Court plans to fine or imprison me at some date in the future there can be no question that I am entitled to a trial by jury in accordance with the Sixth and Seventh Amendments to the Constitution of the United States.

7. Finally, I ask that Judge Ward recuse himself. I realize that I have made this request previously. However, I am repeating this motion because the Hon. Robert J. Ward has, by his acts, clearly demonstrated his unfitness to be a federal judge. It is true that the principle that a judge may not be removed because of inability in both sound and well established by the Constitution. *Chandler v. Judicial Council* 398 U.S. 74 (1970). However, a judge may be removed for inability in a particular case. *Occidental Petroleum Corp. v. Chandler* 303 F. 2d 55 (10 Civ. 1962) (en banc), *cert. denied* 383 U.S. 936 (1966); *United States v. John Anthony Taylor* 487 F. 2d 307 (2d Cir. 1973). In the case at the bar, the judge presently assigned to this case has displayed bias, prejudice and inability and has further demonstrated that he is unmindful of the oath prescribed by 28 U.S.C. 453.

8. At the outset, this case was assigned to Judge Ward illegally by virtue of false representations made to the coordinating clerk by the S.E.C. attorneys. In particular, the S.E.C. attorneys falsely represented that there was a "pending related case" before Judge Ward bearing the docket number 71 Civil 2695. That representation was untrue in that a final judgment had been entered that case and that judgment was on appeal. The S.E.C. attorneys also omitted to state that there was a pending related case before Judge Griesa, 74 Civil 2792, in which the S.E.C. had just requested an extension of time to move to dismiss. Thus, by a tactical manuver, and by

making false statements of material fact to the coordinating clerk, the S.E.C. was able to cause the instant case to be assigned to a district court judge known to be favorable to the S.E.C. Clearly, this was a violation of the due process clause of the Fifth Amendment.

9. It is apparent that the judge himself acquiesced to this procedure. Rule 4(A) of the Calendar Rules for the Southern District of New York requires that all civil actions and proceedings be assigned to a judge by lot. This was not done in this case. Rule 13 provides that related cases be assigned to the same judge by the coordinating Clerk provided there is agreement between the judge to whom the new case was assigned by lot and the judge to whom the older case was assigned by lot in the first instance.

10. In the previous trial, 71 Civil 2695, Judge Ward displayed prejudice by shouting at me on numerous occasions for no apparent reason, by stomping around the courtroom while I was testifying or attempting to examine witnesses, by bearing his teeth, by directing the order in which I was required to call my witnesses by "closing" my case, by displaying prosecutional zeal, and by generally displaying a lack of judicial temperment.

11. In the case at bar, Judge Ward has again displayed prejudice. He required me to return from Iceland on January 8, 1974 to attend a hearing scheduled for that date. However, when I appeared, it turned out that he was away on vacation and would not return for a week. On January 17, 1975, when the so-called hearing was finally held, it is apparent that Judge Ward had communicated with the S.E.C. on an ex parte basis and directed them to have their witnesses, Ira Spindler and Thomas Dolan, present in the courtroom on that date while at the same time advising the S.E.C. that it would not be necessary to call them to testify.

12. At the so-called hearing (Tr 44-5) Judge Ward stated:

"so far, all of your discussion has been standing back there, not under oath, making statements which have no probative value, and I would suggest, you are not an officer of this court whose statements I can accept as an officer of the court. You are appearing pro se."

13. It is apparent from this statement and from many similar statements made by Judge Ward at the previous trial that he is prejudiced against the defendant because the defendant is appearing pro se and Judge Ward is attempting to punish the defendant for not hiring an attorney. While refusing to accept representations of the defendant on the ground that he is pro se, Judge Ward has willingly accepted representations from the S.E.C. attorneys even though, in many cases, these representations have been demonstrably untrue. Furthermore, Judge Ward has protected these S.E.C. attorneys from having their lies exposed by refusing to permit the defendant to call them to testify under oath.

14. For all of these reasons, Judge Ward should recuse himself from proceeding further in this case. Furthermore, since the S.E.C. has no desire to examine the books and records of the defendant, the decision adjudging the defendant to be in contempt of court should be reversed.

15. It should be noted that the defendant has moved Judge Ward to recuse himself on two previous occasions. The first time on December 30, 1974, Judge Ward agreed to recuse himself immediately (Tr 32). Later, Judge Ward changed his mind. At the so-called hearing, Judge Ward criticized the defendant for not submitting an affidavit. It is true that 28 U.S.C. 144 requires the submission of an affidavit. However, in lieu of Judge Ward's prior representation that he would recuse himself from this case, an affidavit should have been unnecessary. In any event, under 28 U.S.C. 144 I am entitled to submit one affidavit as I am doing in this case.

16. As the court is aware, earlier this year I was struck by an automobile with the result that both my legs were broken. In fact, the S.E.C. moved for contempt while I was in the hospital in Plattsburgh, N.Y. I am still unable to walk normally. For this reason this case should be transfered to the Western District of Virginia, Lynchburg Division.

WHEREFORE, I respectfully pray that (1) decision of this court dated July 22, 1975 should be reversed (2) this matter should be set down for a hearing and/or trial by jury and (3) Judge Ward should recuse himself from this case.

s/Samuel H. Sloan
Samuel H. Sloan

Sworn to
July 24th, 1975

APPENDIX "P"
PLAINTIFF'S ANSWERS TO DEFENDANT'S INTERROGATORIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

-against-

SAMUEL H. SLOAN, individually and d/b/a SAMUEL H. SLOAN & CO.

Defendants.

In response to the Interrogatories of defendants Samuel H. Sloan ("Sloan") and Samuel H. Sloan & Co. ("Sloan & Co."), and pursuant to the order of the Court dated August 4, 1975 that the Securities and Exchange Commission ("Commission") answer defendants' Interrogatories 1, 2, 3, 4, 6, and 7, the Commission hereby submits its answers pursuant to Rule 33 of the Federal Rules of Civil Procedure.

Question 1: "State separately each and every act and practice in which plaintiff contends the defendants have engaged, are engaged or are about to engage which constitute violations of Sections 15(c)(2) and 17(a) of the Securities Exchange Act of 1934 and Rule 17 C.F.R. 240.15c2-11 and 17 C.F.R. 240.17a-4 promulgated thereunder."

Answer: (a) Section 15(c)(2) and Rule 15c2-11 thereunder—the defendant Sloan has submitted at least

293 Form 211s with the National Quotation Bureau, copies of which are in the possession of this office, which indicate that the defendants neither knew nor possessed the information required by the Rule. The Commission will, pursuant to Rule 33(c) of the Federal Rules of Civil Procedure, afford the defendants, upon their request, a reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

(b) Section 17(a) and Rule 17a-4 thereunder—the defendants have refused to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Sloan and Sloan & Co.

Question 2: "State whether any of the defendants are registered brokers or dealers with the Securities and Exchange Commission and whether a broker dealer withdrawal request has been filed and the date of said filing."

Answer: On April 28, 1975, the Commission revoked the broker-dealer registration of Sloan & Co., and barred Sloan from association with any broker or dealer (Securities Exchange Act Release No. 11376). The defendants have petitioned the United States Court of Appeals for the Second Circuit for review of this order, on May 13, 1975, that Court declined the defendants' motion for a stay pending appeal (Dkt. No. 75-4087).

On information and belief, on September 17, 1973, the defendants filed with the Commission a Form BDW in which they sought to withdraw their registrations as broker-dealers. Such withdrawal did not become effective, since, pursuant to Rule 17 C.F.R. 240.15b6-1, the Commission had previously, on April 25, 1972, instituted administrative proceedings against the defendants to determine whether the defendants had violated the federal securities laws, and to determine what remedial action, if any, might be appropriate in the public interest.

Question 3: "With respect to each and every quotation published in the pink sheets of the National Quotation Bureau Inc. at the request of Samuel H. Sloan & Co. which plaintiff contends was in violation of Rule 17 C.F.R. 240.15c2-11, state the exact name of the issuer of security, the exact title and class of the security, the quotation published, whether it was a bid or an asked quotation, the date on which the quotation was published, whether the SEC had ever suspended trading in that security and, if so, the dates when the suspension of trading commenced and terminated."

Answer: Defendants are referred to plaintiff's answer to question 1. Moreover, for the purpose of deriving the answer to other parts of this question, the Commission will, pursuant to Rule 33(c) of the Federal Rules of Civil Procedure, afford the defendants, upon their request, a reasonable opportunity to examine, audit or inspect the Commission's public records and to make copies, compilations, abstracts or summaries.

Question 4: "With respect to every quotation listed in item three above, state, by reference to the appropriate subsection of Rule 15c2-11, the manner in which this quotation was manipulative, fraudulent or deceptive."

Answer: According to the terms of Rule 15c2-11, "It shall be a fraudulent, manipulative, and deceptive practice within the meaning of Section 15(c)(2) of the Act, for a broker or dealer to publish any quotation for a security or, directly or indirectly, to submit any such quotation for publication, in any quotation medium . . . unless (the terms of the Rule are complied with)." An examination of the documents referred to in plaintiff's answer to question 1, reveals, on its face, that the defendants have failed to comply with the terms of Rule 15c2-11.

Question 6: "State the time and dates of all conversations by telephone and in person between Ira Spindler and the defendants and between Thomas Dolan and the

defendants and state the substance of all such conversations."

Answer: (a) Upon information and belief, the dates, times, and substance of all conversations between Ira Spindler and Sloan, prior to the commencement of this action, are a matter of public record. See Spindler affidavit of December 30, 1974; Spindler affidavit of March 24, 1975; and transcript of evidentiary hearing held on January 17, 1975.

(b) Upon information and belief, the dates, times, and substance of all conversations between Thomas F. Dolan and Sloan, prior to the commencement of this action, are a matter of public record. See Dolan affidavit of December 30, 1974.

Question 7: "State the time and date of each conversation by telephone and in person between Jerome Selvers and the defendants or their agents between December 30, 1974 and January 8, 1975 and state the substance of each conversation."

Answer: Upon information and belief, the dates, times and substance of all conversations between Jerome M. Selvers, Esq. and Sloan or his agents, between December 30, 1974 and January 8, 1975, are a matter of public record. See Selvers affidavit of December 30, 1974 and Selvers affidavit of January 8, 1975.

Dated New York, New York
September 2, 1975

Respectfully submitted,
s/William D. Moran
WILLIAM D. MORAN
Regional Administrator
Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
26 Federal Plaza
New York, N.Y. 10007
Tel. No. (212) 264-1636

TO: Samuel H. Sloan
c/o 917 Old Trent's Ferry Road
Lynchburg, Virginia 24503

Verified by
Ralph Pernick
on September 2nd, 1975

APPENDIX Q

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,
-against -

SAMUEL H. SLOAN, Individually and d/b/a
SAMUEL H. SLOAN & CO.

Defendants.

74 Civil 5729 (RJW)

ORDER OF CIVIL CONTEMPT

Plaintiff Securities and Exchange Commission ("Commission") having moved by notice of motion dated March 24, 1975 for an order of civil contempt against Samuel H. Sloan ("Sloan") and having submitted an affidavit and a memorandum of law in support thereof, and the Court having filed a Memorandum dated July 22, 1975, and it being established to the satisfaction of the Court that:

1. On December 30, 1974 plaintiff Commission filed a Complaint seeking preliminary and permanent injunctions and certain other relief against the defendants. On that date the Court ordered defendants Sloan and Samuel H. Sloan & Co. ("Sloan & Co.") to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Sloan and Sloan & Co.

2. On January 8, 1975, the Honorable Thomas P. Griesa, United States District Judge, extended said order up to and including January 17, 1975.

3. On January 17, 1975, the Court held an evidentiary hearing on the Commission's application for a preliminary injunction, and issued an Order of Injunction ordering, *inter alia*, Sloan and Sloan & Co. to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Sloan and Sloan & Co.

4. On January 20, 1975 the defendants filed a notice of appeal to the United States Court of Appeals for the Second Circuit from said Order of Injunction and moved the Court of Appeals by notice of motion filed January 23, 1975 for a stay of said Order of Injunction pending appeal. The Court of Appeals denied the defendants' motion for a stay on February 13, 1975.

5. The defendant Sloan refused to permit examiners of the Commission to inspect the books and records of Sloan & Co., and the Commission moved by notice of motion dated March 24, 1975 to adjudge Sloan in contempt of this Court for wilful violation of the Court's Order of Injunction dated January 17, 1975.

6. The Court filed its memorandum dated July 22, 1975 in which it was found that the defendant Sloan wilfully violated this Court's order of preliminary injunction dated January 17, 1975 by refusing to permit inspection of the books and records of Samuel H. Sloan & Co., by representatives of the Commission.

7. Defendant Sloan moved by notice of motion dated July 28, 1975 for, *inter alia*, reargument of this Court's decision of July 22, 1975 and for a hearing and or trial by jury on the motion for contempt. On August 18, 1975 the Court filed its memorandum denying said motion.

BEST COPY AVAILABLE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant Sloan is in civil contempt of this Court for wilful failure to comply with the Order of Injunction dated January 17, 1975 by refusing to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Sloan & Co., and it is further

ORDERED, ADJUDGED AND DECREED that the defendant Sloan be and he is hereby granted twenty (20) days from date of this Order within which to purge his contempt by permitting immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Sloan & Co., and it is further

ORDERED, that defendant Sloan appear before this Court on the 26TH day of SEPTEMBER, 1975, at 2:15 o'clock in the afternoon, in Room 906 of the United States Courthouse, Foley Square, New York, New York, for sentencing and it is further

ORDERED that, in the event the defendant Sloan fails to appear before the Court on the date above indicated, the Commission is authorized to serve a certified copy of this Order of Civil Contempt upon the United States Marshal, and the United States Marshal shall, upon receipt of a certified copy of this Order of Civil Contempt, arrest Samuel H. Sloan and confine him to the Metropolitan Correctional Center, 150 Park Row, New York, New York, until he permits immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Sloan & Co.

Dated: New York, New York
September 3, 1975

(signed) Robert J. Ward

UNITED STATES DISTRICT JUDGE

APPENDIX R—MOTION TO COURT OF APPEALS FOR IMMUNITY FROM ARREST AND AFFIDAVIT OF SERVICE

United States Court of Appeals
for the Second Circuit

Securities & Exchange Commission,

Plaintiff-appellee,

-against-

Samuel H. Sloan individually and d/b/a Samuel H. Sloan & Co.,

Defendant-appellant.

75-6106

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed affidavit of Samuel H. Sloan sworn to the 23rd day of December, 1975 the undersigned hereby moves this court for an order granting immunity from arrest or, in the alternative, for a temporary 48 hour stay of the order of civil contempt so that the appellant may be able to attend court on January 7, 1976 for the purpose of participating in the oral argument of appeals no. 74-1436, 75-7046 and 75-7056.

Dated: December 23, 1975
REYKJAVIK, ICELAND

Yours, etc.,
s/ Samuel H. Sloan
Samuel H. Sloan
KLEPPSVEG 26
3 HAED T.H.
REYKJAVIK, ICELAND

To:
Thomas L. Taylor III
Securities & Exchange Commission
500 N. Capital St.
Washington, D.C. 20549

AFFIDAVIT IN SUPPORT OF MOTION

United States Court of Appeals
for the Second Circuit

Securities & Exchange Commission,

Plaintiff-Appellee,

-against-

Samuel H. Sloan individually and
d/b/a Samuel H. Sloan & Co.,

Defendant-appellant.

75-6106

REYKJAVIK)
ICELAND) S.S.:

Samuel H. Sloan, being duly sworn, deposes and says:

1. I make this affidavit in support of a motion for immunity from arrest or, in the alternative, for a temporary 48 hour stay of Judge Wards order of civil contempt dated September 3, 1975. On September 26, 1975 I moved for a stay of Judge Ward's order and that motion was denied. The instant motion, however, is made for a different reason and under different circumstances. A motion essentially identical to the instant motion was made before Judge Ward on December 2, 1975. As far as I know, Judge Ward has yet to make a decision on that motion. Because oral argument has been scheduled for January 7, 1976 at 9:30

A.M. I feel that I can wait no longer before making this motion here. In addition, since this motion concerns matters of direct interest to this court, I feel that this motion is most appropriately brought here in any event.

2. A copy of my moving papers in the district court are attached hereto and marked exhibit A. A copy of the response of the S.E.C. is attached hereto and marked exhibit B.

3. I am presently in Iceland. I have no plans to return to the United States until these appeals have been decided. However, I would like to be able to attend court on January 7, 1976 to argue appeals no. 74-1436, 75-7046 and 75-7056. This court has given me 40 minutes to argue these three appeals. However, it will be physically impossible for me to do so unless I am given either immunity from arrest or I am granted a stay of Judge Ward's order. I need about a 48 hour stay in order to be able to get in and out of the United States considering possible cancellation of flights and other contingent problems. Naturally, I would be gratified if this court were to grant me a stay pending appeal but this relief has been denied previously and would not be necessary for the purposes which bring about this motion.

4. I view this case as being one where a district judge has conducted a trial in abstentia or conducted proceedings ex parte. The simple fact is that Judge Ward refused to give me a hearing and, because he decides motions on papers without hearing oral argument, it was not even possible to present my side of this case. However, by refusing to permit me to come into his courtroom he also deprived himself of the jurisdiction and the power to enforce his own order. There was no order to show cause or order of civil arrest in compliance with Rule 42(b) Fed. R. Crim. P. There was no proper service of a summons and complaint. The S.E.C. did not even give me the required 10 days notice in its motion for civil contempt. Nor can any claim be made that I was likely to run away because, as a matter of fact, I was in the hospital because I had sustained two broken legs as

the result of an automobile accident. In short, every rule of procedure with respect to either civil or criminal contempt was ignored in this case.

5. However, that is not the issue here. The sole issue is whether this court will make it physically possible for me to attend at court to argue my appeals. These appeals are complex and involve many issues of fact. Congress has established the policy of permitting appellants to argue their cases orally. I realize that there have been exceptions to this policy but none of these exceptions apply here. If I did not believe that the presentation of my oral argument is essential to my right to appeal in these cases I would not be prepared to travel nearly 3000 miles in order to be in court on January 7, 1976. Although the S.E.C. has protested vigerously it has not yet cited any harm which will result to the S.E.C. if I am permitted to argue my cases orally nor has it shown any public policy that will be undermined by permitting me to appear in court to argue my appeals. Indeed, if this court did not agree with me on this point it would not have accorded me a total of 40 minutes to argue my appeals. The S.E.C. will also have 40 minutes to argue on that day. It is essentially unfair for the S.E.C. to be given 40 minutes to argue under circumstances where it is not possible for me to be present. I am not, however, objecting to the presence of the S.E.C. on that date. I merely wish to be permitted to appear and argue on an equal footing with the S.E.C. Furthermore, there is authority for the granting of this motion under these circumstances. The immunity principle is well established in the New York State courts and, according to the S.E.C.'s own brief, this principle has also been applied in the federal courts. Therefore this motion must be granted.

s/ Samuel H. Sloan
Samuel H. Sloan
Kleppsvegi 26
3 Haed t.h.
Reykjavik, Iceland
Tele-no. 35332

Certificate of Acknowledgment of Execution of an Instrument

Republic of Iceland
City of Reykjavik
Embassy of the United
States of America

I, Charles D. Mierzejewski, Vice Consul of the United States of America at Reykjavik, Iceland duly commissioned and qualified, do hereby certify that on this 23rd day of December, 1976, before me personally appeared Samuel H. Sloan to me personally known, and known to me to be the individual described in, whose name is subscribed to, and who executed the annexed instrument, and being informed by me of the contents of said instrument he duly acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and official seal the day and year last above written.

s/ Charles D. Mierzejewski
Charles D. Mierzejewski
Vice Consul of the United States of America.

[Seal]

APPENDIX S—TRANSCRIPT OF PROCEEDINGS OF FEBRUARY 2, 1976

***

MR. SLOAN: I am inclined to question why you called this hearsay. It's not hearsay. It's a statement by the Securities and Exchange Commission. Mr. Jacobs has indicated that he is not aware of the statement, but, of course, Mr. Jacobs is not the attorney on this case.

THE COURT: Well, if you have an affidavit, let me see it.

MR. SLOAN: Your Honor, I have no more documents with me.

THE COURT: If you want to take the stand and swear that the statements you just made, I would ask you, number one, to state the specifics of when and under what circumstances the statements were made by Mr. Pernick. I would ask the statements be set forth. I would have to warn you at this time that if you testified falsely in any material respect this matter would be sent to a grand jury for such action as they deem appropriate which goes beyond the contempt and touches on perjury. It's a serious matter to the Court. But if you are prepared to take the stand and swear to what you have just stated, you say this statement of admission against interest by the Commission, I am not sure what the position is of the Commission and therefore I call it hearsay.

But let's say he's in such a position he could bind the Commission, I would hear you, and then we will get ahold of Mr. Pernick and I will hear what he says.

If you wish to take the stand and have Miss Kruger administer the oath and testify under oath, you may do so. However, I must warn you that any statement you make, in view of your past record with this Court, will be looked at with considerable care and scrutiny, and if at odds with the sworn statement of any other person might be presented to

a grand jury and might be the basis of a separate and additional charge of perjury. I suggest before we go further you have the right to consult with counsel, you have the right to remain silent. I do not consider your oral unsworn statement to me to fall into the category of perjury and before you take the next step, I suggest you determine in your own mind what you wish to do.

MR. SLOAN: Your Honor, I would just like to make the observation that to this date no representative of the Securities and Exchange Commission has called even a single witness to testify. You are asking me to testify under oath to rebut statements which were made—which have not been made in oral testimony.

I would be perfectly happy to take the stand, but I just want to make the observation there has been no hearing with respect to this contempt. I was given no opportunity to have a trial. In fact, I requested a trial by jury, which I am entitled to under the Supreme Court decisions of Curtis v. Loether and Parnell v. Southall Realty, 1974 cases. However, I would be happy to take the stand and verify this.

THE COURT: Very well. You may take the stand, and, Miss Kruger, will you administer the oath.

SAMUEL H. SLOAN, called as a witness in his own behalf, having first been duly sworn, was examined and testified as follows:

THE COURT: Let the record reflect that as Mr. Sloan was proceeding to the stand another gentleman arrived and is sitting with Mr. Jacobs.

Mr. Jacobs, would you introduce him for the record?

MR. JACOBS: Let the record reflect that Mr. Ralph Pernick, the attorney on the staff of the Securities and Exchange Commission, about whom we have been referring, is now present in the courtroom.

Thank you, your Honor.

THE COURT: Very well.

EXAMINATION
BY THE COURT:

Q Mr. Sloan, would you state your full name?

A Samuel H. Sloan.

Q Where do you reside?

A I don't know.

Q Where was your last residence?

A Kleppsvegi 26, Reykjavik, Iceland.

Q Mr. Sloan, are you the individual defendant in this proceeding?

A Yes.

Q Were you present in court before me on January 17, 1975 when I signed an order which provided among other things that you were to permit immediate examination in an easily accessible place by examiners and other presentatives of the Securities and Exchange Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan and Company as referred by the Securities and Exchange Act of 1934?

A Your Honor, you qualified your statement in a number of ways. To begin with, there is no requirement in the Securities and Exchange Act of 1934 that I permit the Securities and Exchange Commission to examine my records. So in answer to your question, since you put that qualification in, I would have to say no.

Q Were you present in court when I signed an order requiring you to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan and Company?

A Your Honor, again, that statement you qualified. I believe that the order said something about that I was to comply with Section 17A of the Securities Exchange Commission of 1934 and Rule 17A-4 promulgated thereunder.

I would like to point out since that time Section 17A of the Securities and Exchange Act of 1934 has been amended and the specific language which the Commission relied upon in its case previously has been deleted, so there is nothing in Section 17A which states implicitly even that the Securities and Exchange Commission has the right to examine my records.

And, therefore, I do not agree with your statement of what the order says.

THE COURT: Does the Commission have a copy of my order of January 17th, Mr. Pernick?

(Handed to Court.)

THE COURT: Thank you. Let the record reflect that I have been handed a three page order, a copy of an order, which I signed on January 17, 1975 at approximately six p.m.

BY THE COURT:

Q Mr. Sloan, were you present before me on that date and time?

A No, I don't believe so. No.

Q January 17, 1975?

A Yes. I was there.

Q You were there?

A Yes.

Q And were you handed a copy of an order which I signed at approximately six p.m. on that date?

A I don't recall that you signed it at 6:00 p.m.

Q Were you handed a copy of an order which I signed late on the afternoon of that date following the conclusion of a hearing which had been conducted at which you had appeared?

A Yes, your Honor.

THE COURT: I would note that on page 2 the order

reads as follows:

"Order, adjudged and decreed that Samuel H. Sloan and Samuel H. Sloan and Company, their agents, servants, employees, attorneys, successors and assignees and those persons in active concert or participation with them (or any member or dealer registered with the Commission of which defendant Samuel H. Sloan may become a principal or controlling person) be and they hereby are (a) ordered to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan and Company (or any other broker or dealer registered with the Commission of which Samuel H. Sloan may become a principal or controlling person) as required by Section 17A of the Exchange Act, 15 USC, 78(q)(a) and Rule 17A-4 promulgated thereunder, 17CFR, 240.17(a)-4."

The order reads further:

"(b) enjoined from further violations of the examination provisions of Section 17A of the Exchange Act, 15 USC, 78(q)(a) and Rule 17A-4 promulgated thereunder, 17 CFR 240.17 (a)-4; and (c) ordered not to remove, destroy or alter the books and records of Samuel H. Sloan and Samuel H. Sloan and Company required to be made, maintained and preserved pursuant to Section 17A of the Exchange Act, 15 USC, 78(q)(a) and Rule 17A-3 and 17A-4 promulgated thereunder, 17 CFR 240.17 (a)-4."

The order goes on and at the bottom provides that the court shall retain jurisdiction over this matter for all purposes.

BY THE COURT:

Q Were you given a copy of that order?

A Your Honor, I was originally asked to take the stand to testify concerning a telephone conversation in September of 1975 and consequently I must object to this line of

questioning. I don't see what purpose it accomplishes.

Q Well, it accomplishes the purpose of the Court obtaining under oath your version of the events which began on that date and which proceed up to this date.

THE COURT: Do you decline to answer the question regarding whether you were given a copy of my order?

THE WITNESS: I am objecting to the question. If you overrule the objection—

THE COURT: I Do.

A Then the answer is yes.

Q You were present. And were given a copy of the order; is that correct?

A Yes.

Q From that day, January 17, 1975, to this day, have you furnished your books and records to the Securities and Exchange Commission or any agent or employee thereof to be examined by a representative of the Commission?

THE WITNESS: Your Honor, again I object to this question. When I took the stand no statement was made that any question of this kind was going to be asked. I was asked to testify concerning a telephone conversation in September of 1975 and I assumed that that would be the extent of the testimony.

THE COURT: The objection is overruled.

THE WITNESS: May I ask for what purpose I am being asked this question?

THE COURT: Just one moment. (Pause.)

THE COURT: Mr. Reporter, may I have the last comments?

(Record read.)

THE COURT: I deem this relevant and material background so that we can establish clearly the materiality of what I am about to ask you.

THE WITNESS: Your Honor, I am not sure whether I am on trial. Is this a criminal trial? There was a case in the Supreme Court—

THE COURT: Don't argue with me. If you choose not to answer the question on the grounds you assert your rights and privileges under the fifth amendment to the Constitution, you may do so. Otherwise you are to answer the question.

THE WITNESS: Your Honor, I am going to have to request assistance of counsel. When I invoke the fifth amendment it brings in all kinds of things which I don't know or appreciate what is involved.

THE COURT: You are under oath and your testimony will be scrutinized relative to the matter of perjury. Therefore, if you choose not to answer the last question, I will consider that you have invoked your right to claim the fifth amendment privilege and I will not press that question.

Do you wish to have counsel before you answer any more questions?

THE WITNESS: Your Honor, I was asked to take the stand concerning a conversation in September, 1975. If I take the fifth amendment on one question, somebody might contend that I have waived any right to give answers selectively to certain other questions. And frankly, I don't even know what the law is on fifth amendment cases. I haven't invoked the fifth amendment before and I don't know what I am getting into and no statement was made before I took the stand as to what the question was going to be or what was going on here.

And I would again ask that counsel be assigned to represent me at this time.

THE COURT: Before you answer any more questions, including questions relative to your conversation with Mr. Pernick; is that right?

THE WITNESS: Your Honor, I am perfectly willing to testify concerning my conversation with Mr. Pernick.

THE COURT: Let's proceed to that then.

BY THE COURT:

Q Why don't you tell me in your own words any and all conversations you had with Mr. Pernick regarding the furnishing of your records, particularly conversations wherein Mr. Pernick stated that the Commission was no longer interested in obtaining your books and records?

A Your Honor, subsequent to September 3rd, 1975, between September 3rd and September 20th, I don't recall the date, I called the Securities and Exchange Commission and asked to speak to Mr. Pernick.

Mr. Pernick apparently wasn't there, but some time later he called me back.

Q What was the date of the call that you received from him?

A I don't recall. It was between September 3rd and September 20th.

Q Between September 3rd and September 20, 1975?

A Yes.

Q All right.

Mr. Pernick called you. Where did he call you, at what place?

A In Virginia. Probably I should say that this is a man who identified Mr. Pernick. I have never seen Mr. Pernick before he walked into the courtroom today.

Q And what did Mr. Pernick say?

A Mr. Pernick said that the New York Regional office of the Securities and Exchange Commission had no further interest in examining my records.

MR. JACOBS: Your Honor, could I get that last answer read back?

THE COURT: Yes.

(Record read.)

A The New York regional office.

Q Did Mr. Pernick indicate that it was just the New York regional office which had no further interest in examining your records, or did he say the Commission in Washington also had no further interest in examining your records?

A All Mr. Pernick stated as I recall that the New York regional office had no further interest in examining my records.

Q Did he say anything else?

A Not that I recall.

Q Did you say anything?

A I repeated the statement back to him as I recall. I'm not—the details of the conversation are hazy, but I am certain that he said the New York regional office of the Securities and Exchange Commission had no further interest in examining my records.

Q Did you have any subsequent conversations with Mr. Pernick on the subject of your furnishing your records?

A No.

Q Did you have any subsequent conversations right up to today with any representative of the Securities and Exchange Commission with regard to the examination of your records?

THE WITNESS: Your Honor, again I object. I was asked to testify concerning a telephone conversation in September and I gave the testimony concerning this conversation.

THE COURT: I will not require you to answer any further questions.

Q You are now under oath. If there is any statement you

wish to make to supplement what you have already said, you may do so, but I shall not ask any further questions of you.

A I just wanted to repeat the statement that I spoke to my mother long distance, I was in Reykjavik, Iceland until yesterday. And she told me she had called Mr. Taylor of the Washington, D.C. office, the general counsel of the Securities and Exchange Commission. Mr. Taylor incidentally is the attorney who is in charge, perhaps not in charge, but the attorney directly assigned to handle all my cases on appeal, the office of the general counsel. And Mr. Taylor—my mother informed me that she offered to make my records available, that the Commission could come down and look at them and Mr. Taylor declined the offer.

Q You know nothing about that conversation?

A No.

Q And what you say your mother told you?

A That's correct.

Q Are you telling us now that all of your records are located at your mother's home in Virginia?

A Well, I would say so, although many records are now on file in the United States Court of Appeals.

Q Is it fair to say except for those records which are on file in the United States Court of Appeals the rest of the records are located at 917 Old Trent Ferry Road, Lynchburg, Virginia?

A I believe so.

THE COURT: Mr. Jacobs and Mr. Pernick, do you wish to put any questions to Mr. Sloan?

MR. JACOBS: No, your Honor.

THE COURT: Mr. Sloan, I will not ask any further questions of you in view of your claim that you want to consult with counsel prior to answering any other questions.

I will say before you are excused, if there is anything else you wish to say at this time, you may do so.

THE WITNESS: No.

(Witness excused.)

THE COURT: Mr. Pernick, you were not here earlier, but I think you arrived in sufficient time to learn the gist of what Mr. Sloan has indicated.

In response to the Court's inquiry relative to the matter before it, Mr. Sloan said the matter in essence was moot because the Commission had no further interest in examining his records. He buttressed the argument by first pointing out the fact to the Court that no representative of the Commission was here at the day and date and time when he appeared.

I noted the adverse weather and had a call made to the regional administrator and Mr. Jacobs arrived.

I note that you have now arrived and I should like to ascertain from you, first, whether your late arrival indicates that the Commission has no further interest in examining Mr. Sloans' books and records, and to have you state whether you concur or disagree with the statement made by Mr. Sloan; and finally, I would ask you to tell me what the Commission's position on this matter is at this time.

MR. SLOAN: Your Honor, I want to say one thing. I am just taking the stand to testify under oath and I would ask that Mr. Pernick be required to testify under oath if he is going to make any statements regarding anything, matters as to which I testified.

THE COURT: You are a party to this action, sir. Relative to Mr. Pernick, I will hear from him in the first instance and then I will determine what we do from there.

MR. JACOBS: Your Honor, before Mr. Pernick makes any statement, we would request the Court grant us a three or four minute recess, we can discuss this matter and I can

tell him what I said and what was discussed between myself and Mr. Sloan.

MR. SLOAN: Your Honor, I am at a disadvantage in these proceedings. I am sure Mr. Pernick and Mr. Jacobs want to have a powwow concerning what Mr. Pernick testified to. I have been testifying under oath. He listened to what I had to say. If he wants to dispute it or dispute it, I think he should take the stand right now.

THE COURT: Well, I will hear from Mr. Pernick now.

THE CLERK: Are you going to be sworn?

THE COURT: No, I will hear from him orally. He's an attorney, representative of the Securities and Exchange Commission. Let me hear from him orally and then I will determine what we do from that point on.

MR. PERNICK: Thank you, your Honor.

As to the first point, my late arrival here today is due solely to weather conditions. The Commission is interested in examining the books and records of the defendant as to communications between myself and Mr. Sloan, there were two telephone conversations that I had with Mr. Sloan.

The first occurred in late February of 1975 during which time I informed Mr. Sloan of your Honor's order of injunction which was signed on January 17th, 1975 and I asked Mr. Sloan what time and place would be convenient for examination of those books and records.

Mr. Sloan declined to set up any such time, saying that no time would be convenient and he refused to permit the inspection as ordered.

Subsequently, in September of 1975, between September 3rd, the date that the order of civil contempt was signed and September 26, the date which the order of civil contempt was set for sentencing, I telephoned Mr. Sloan in Virginia.

Again I reminded him both of the order of injunction

and of the order of civil contempt, which had recently been signed requiring that he permit an inspection of his books and records by representatives of the Commission.

In the course of that conversation, I again asked what time and place would be convenient for such an inspection. Mr. Sloan then asked me if I personally would be conducting the inspection. I said no.

Subsequently, in the course of that conversation, I stated to Mr. Sloan that in view of the fact that the records in question were located in Lynchburg, Virginia, it appeared likely that representatives of the Commission, from its Washington office rather than the New York regional office, would be the individuals who would personally make the inspection. At no time did I indicate either that the Securities and Exchange Commission or that the New York regional office was no longer interested in conducting the examination.

THE COURT: Thank you.

I regard this matter very seriously. I think that the defendant Sloan has trifled with this Court—

MR. SLOAN: Your Honor, I object most strenuously. Mr. Pernick has not testified under oath. We have been through this many, many times where a representative of the Securities and Exchange Commission has said something and you take it as a matter of evidentiary fact. I went through a five day trial with you in 1973 where the Commission repeatedly stood up and made statements not under oath which are not supported by any evidence, you copied their brief in your decision. I noticed in the brief that the SEC filed with the Court of Appeals they didn't even defend your findings of facts and, in fact, your findings of fact could not be defended because there was no evidence in the evidence about any findings and you are about to do the same thing.

I see you are going to say Mr. Pernick, because he is a member of the bar of this court, you frequently refer to that

fact, you must accept his statements as true and therefore you will convict me of perjury and send me to jail.

Your Honor, I have refrained, your Honor, from doing a lot of things that I really should do in this case—

THE COURT: Sit down, Mr. Sloan.

Marshal, the Court of Appeals is in session. I direct that you take Mr. Sloan from this courtroom to the Court of Appeals so that he may appear there. I direct that you then return him to this courtroom and I will deal with this matter.

Mr. Pernick, I will ask you that you remain until Mr. Sloan's return. At that time I shall deal with Mr. Sloan—

THE MARSHAL: Take your hat off.

THE COURT: Mr. Sloan, remove your hat.

You will be back here later in the company of the marshal. I consider you to be in contempt of this Court. I consider that you have not purged yourself of contempt, but have only made matters worse. I shall deal with you upon your return.

The court is adjourned.

THE COURT: Take your hat and coat with you. But don't wear it, the hat.

We will deal with you when you return, sir.

(Recess.)

APPENDIX T—FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED FEBRUARY 2, 1976 AND FURTHER TRANSCRIPT OF PROCEEDINGS

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CROSS-EXAMINATION

BY MR. SLOAN:

Q I want to ask Mr. Pernick what records are you interested in examining?

MR. JACOBS: Objection, your Honor. All the records of the broker-dealer or any registered broker-dealer well known to Mr. Sloan on subject's examination is not relevant.

THE COURT: If Mr. Pernick wishes to say something in his own language, he can go ahead and do it.

THE WITNESS: The Commission is interested in examining all records of Sloan and Company.

THE COURT: Very well. Anything further?

MR. JACOBS: No, your Honor.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Anything further?

MR. JACOBS: No, your Honor.

THE COURT: Mr. Sloan?

MR. SLOAN: No.

THE COURT: Anything further?

MR. SLOAN: Your Honor, I think the record clearly establishes that for a period of approximately one year I have been available. The Commission never even takes the trouble to make a telephone call.

I further would like to note this case was started in December, 1974. It's now February, 1976. The Securities

and Exchange Commission has made no effort to put this case on the trial calendar. They conducted no discovery proceedings. This is as I understand in the preliminary injunction stage. The reason I say I understand is because one court order is unclear in that respect, whether it is a preliminary injunction or whether the main lawsuit is ended, but the Commission has argued that this is a preliminary injunction.

I might mention also that the Securities and Exchange Commission has yet to cite any law either in the Securities and Exchange Acts or any rules of the SEC or any court decision which gives the Securities and Exchange Commission the right to examine the records.

There is one case the SEC relied in its brief to the Court of Appeals is SEC v. Olsen. I understood Judge Ward was counsel for the defendant. In that case the suit was based on a immunity provision which then existed in Section 21(d) of the Securities and Exchange Act of 1934, but since that time Section 21(d), I think in 1970, Section 21(d) was taken out of the Securities and Exchange Commission so there is no immunity provision.

The Securities and Exchange Commission has not proceeded with diligence to bring this case to trial. They have not proceeded with diligence to go to Virginia to examine the records. The records I do not have in my possession are voluminous, large and heavy. At one time I had to transport the records, and I had to rent a truck in order to be able to do it. It's impossible for an individual person to carry the records with him.

I also would like to point out a point I made in the past, a person shall have a right to be secure in his books, papers and personal effects, the fourth amendment, and I can't think of a case better than the case of a Securities and Exchange Commission which wants to examine in effect every piece of paper I have in my possession. That is not really an issue, because the Securities and Exchange Commission hasn't even evidenced sufficient interest in the

matter to go to Virginia or even indicated sufficient interest in the matter between April of '75 and certainly September of '75 during which period I was incapacitated. They were well aware they could go to Virginia at any time during that period and since I had two broken legs and was bedridden, I would be powerless in effect to do something to resist the attempts to examine my records.

To this date they can go to examine my books and records and to this date they haven't done so. So I don't believe there is anything before the Court. I believe that not only should the Court not take any action with respect to me, but the lawsuit itself should be dismissed.

THE COURT: Mr. Jacobs, is there anything you want to say?

MR. JACOBS: Your Honor, I was about to say nothing. I will just say two things.

The only thing I agree with Mr. Sloan on is that the record does speak for itself and does, in fact, reflect the true state of facts in this case and I think Mr. Sloan's characterization of what those facts are is entirely inaccurate. And second, that inaccuracy goes to the very heart of this matter, and that is whether Mr. Sloan is able to walk or unable to walk he at no time ever made his records available in accordance with the law and he still has not made the records available to the staff of the Securities and Exchange Commission and therefore he is in violation of the Court's order as well as in violation of the Securities and Exchange Commission of 1934.

THE COURT: I would comment in one respect to Mr. Sloan's pointing out I think one of the many underlying errors that we labor under.

You indicated that this case should have been pressed forward to a disposition. You overlook the fact that you have chosen to take appeals to the United States Court of Appeals for the Second Circuit in connection with this Court's issuance of the order of January 17, 1975, and due

perhaps in part to your automobile accident and perhaps in part to the fact that you were proceeding pro se that appeal was not disposed of until January 7, 1976, less than one month ago.

You complain that there has been no discovery, yet you have declined to produce your books and records. And I would note based on a postcard that I received from you dated 12/22/75, the oral statement today that you arrived from Iceland last night, you appear to have been out of the country during the period following the disposition by the Court of Appeals of your appeals in this case.

So, I think it is hardly appropriate to argue to this Court that this case should have proceeded along with discovery and trial when we had appeals pending by you and since you were absent from the country when the appeals were determined.

The Court is prepared to render a decision.

The Court makes the following findings of fact and conclusions of law:

1. On January 17, 1975 this Court signed an order containing inter alia a mandatory provision requiring Samuel H. Sloan to permit immediate examination in an easily accessible place by examiners and other representatives of the Securities and Exchange Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan and Company.

2. A copy of this order was handed to Mr. Sloan after it was signed on January 17, 1975.

3. Mr. Sloan sought a stay of the aforementioned order from the United States Court of Appeals for the Second Circuit, which was denied on February 13, 1975.

4. On February 26th, 1975 Ralph Pernick of the Securities and Exchange Commission staff had a telephone conversation with Mr. Sloan during which he reminded Mr. Sloan of the court's order of January 17, 1975, and during which he inquired of Mr. Sloan what time during

the following week would be convenient for an examination of the books and records of Samuel H. Sloan and Samuel H. Sloan and Company.

Mr. Sloan stated in substance that he was not inclined to cooperate. No offer was made by Mr. Sloan to make the books and records available at any specific date and time.

5. On March 24, 1975, the books and records not having been forthcoming, the Securities and Exchange Commission moved this Court for an order adjudging Mr. Sloan to be in civil contempt of the order of January 17, 1975.

6. In view of the fact that Mr. Sloan has been involved in an automobile accident in March, 1975, the Court deferred action on the contempt motion until July 22, 1975. At that time the Court filed a memorandum decision granting the contempt motion. The Court determined that Mr. Sloan had willfully violated the order of January 17, 1975, requiring him to permit the aforementioned examination of his books and records.

It should be noted that in various papers filed with this Court Mr. Sloan did not contest the facts as presented by the Securities and Exchange Commission, preferring to argue only that he could not be constitutionally required to permit the examination.

Although Mr. Sloan asked for a trial, the Court would note that because he chose to argue the legal points there were no factual questions for adjudication. Mr. Sloan moved for reargument, which motion was denied.

7. Thereafter on September 3rd, 1975, this Court entered an order adjudging Mr. Sloan in civil contempt and giving him 20 more days in which to purge himself of the civil contempt by permitting inspection of the books and records of Samuel H. Sloan and Samuel H. Sloan and Company.

8. Between September 3rd and September 26, 1975, Ralph Pernick of the Securities and Exchange Commission, had a second telephone conversation with Mr.

Sloan the substance of which was as follows:

Mr. Pernick informed Mr. Sloan of the order of civil contempt which had been signed by this Court. Mr. Pernick asked Mr. Sloan what time would be convenient for an examination by examiners and other representatives of the Securities and Exchange Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan and Company.

Mr. Sloan then inquired whether Mr. Pernick himself would inspect the records. Mr. Pernick stated since the records appear to be located outside of New York in an area which was closer to Washington, D.C., representatives of the Commission in Washington would undoubtedly be assigned to conduct the examination rather than the New York office.

The Court finds that Mr. Pernick never advised Mr. Sloan that the Securities and Exchange Commission was not interested in inspecting his records.

Finally, with regard to the telephone conversation in September, 1975, the Court finds that Mr. Sloan refused to allow an examination by examiners and other representatives of the Securities and Exchange Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan and Company.

9. On September 26, 1975, Mr. Sloan was required to appear before this Court for sentencing in connection with his failure and refusal to permit inspection of his books and records. Despite the fact that he had appeared before the United States Court of Appeals for the Second Circuit on the morning of that day, Mr. Sloan failed to appear before this Court for sentencing at 2:15 p.m. At that time Mr. Pernick advised the Court that up to that moment Mr. Sloan had not permitted the examination of his books and records. The Court thereupon ordered Mr. Sloan's arrest and directed his confinement until such time as he permitted an examination in an easily accessible place by

examiners and other representatives of the Securities and Exchange Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan and Company.

10. The marshal reported to the Court that he was unable to execute the warrant and in December, 1975, the Court learned that Mr. Sloan had left the United States and was in Iceland. This information was brought to the Court's attention by Mr. Sloan himself in a postcard dated 12/22/75, which indicated that until further notice his address would be in Iceland.

Mr. Sloan returned to the United States and surrendered himself to this Court. His return to the United States, according to his statement, was February 1 and his surrender to this Court was on February 2.

11. Up to this moment the examination of the books and records of Samuel H. Sloan and Samuel H. Sloan and Company, which was ordered on January 17, 1975, has not been held, despite the fact that the Securities and Exchange continues to request the examination.

The Court makes the following conclusions of law:

1. The Court has jurisdiction over the subject matter of this action and over the person of Mr. Sloan.

2. On January 17, 1975 this Court duly issued an order directing that Mr. Sloan permit immediate examination of the books and records of Samuel H. Sloan and Samuel H. Sloan and Company in an easily accessible place by examiners and other representatives of the Securities and Exchange Commission.

3. Mr. Sloan received notice of this order.

4. From the time he received notice of the order on January 17, 1975 up to and including the present date, February 2nd, 1976, Mr. Sloan has failed to make his books and records available to representatives of the Securities and Exchange Commission despite requests to do so.

5. The Securities and Exchange Commission has continued to request that the books and records be made available and Mr. Sloan has continuously failed and refused to make them available.

6. Samuel H. Sloan has failed to purge himself of the contempt of this Court's direction of September 3rd, 1975 that he make the aforementioned books and records available for examination by representatives of the Secutiries and Exchange Commission.

7. In view of the fact that the Court heretofore found the defendant in contempt of this Court and in view of the fact that to date he has not purged himself of contempt of this Court, the Court adheres to its prior determination that Mr. Sloan is in contempt of this Court. And finding that he has not purged himself of contempt, orders that he be confined at the Metropolitan Correctional Center, 150 Park Row, New York, New York until he permits examination in an easily accessible place by examiners and other representatives of the Securities and Exchange Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan and Company.

The Securities and Exchange Commission is directed to have examiners and other representatives available so that they can forthwith proceed to whatever place Mr. Sloan indicates the books and records are located, including Lynchburg, Virginia, and upon their making their examination are directed to report back to the Court.

Following the completion of the examination and the rendering of this report to the Court, the Court is prepared to consider whether or not the defendant has purged himself of contempt.

The defendant is remanded.

MR. SLOAN: May I be heard? Your Honor, could you explain what you mean by an easily accessible place?

THE COURT: I would require the Commission to send its representatives from Washington either to the Southern

District of New York or to Lynchburg, Virginia. And I would ask the Commission if they are prepared to do this forthwith.

MR. JACOBS: Yes, your Honor.

MR. SLOAN: Well, I can state on the record, your Honor, that my records are in Virginia. They will have to call my mother and speak to her about it. She doesn't work in Lynchburg. She works in a place called Catawba, which is about 75 miles away.

THE COURT: Well, you will have access to a telephone while you are in custody and I would suggest that you make two telephone calls: One to your mother to authorize the requisite examination, and the second to the Commission to indicate that the records are available and when they can come.

I will direct the Commission to act forthwith. As I have a report from them that the inspection has been carried out, I shall be prepared to consider whether or not you have purged yourself of contempt and shall be prepared promptly to consider whether or not you may be released.

MR. SLOAN: Your Honor, as I explained to you, I can give you my mother's telephone, you can call her, ask her, if you want to, she has possession of the records. She is the one who has decided—she told the Commission that she will let them see them. The Commission has declined.

I can give you her telephone number and you can verify the statements. You can get on the telephone and verify the accuracy and the Commission can fly to Virginia and see the records if they want to.

THE COURT: I indicated what I believe you should do. To the extent the Commission can cooperate with Mr. Sloan to move the matter along expeditiously, I direct that they do so. I do not want Mr. Sloan to remain in custody any longer than is absolutely necessary.

It does not give this Court any feeling of accomplishment

to have to do this, but we have been at this, Mr. Sloan, since January 17, 1975. It is very rare that this Court has seen fit to exercise its contempt powers, but I must say you were given an inordinate amount of time to proceed in this matter. Your unfortunate accident was taken into account. You are well aware the Court waited for some four months to permit you to recuperate from that accident and at that point all you had to do was pick up the telephone and call the Commission and say, "Come down and look at the records."

You chose not to. For what reason you chose not to, I do not know.

We have reached a point now where I have ruled in the matter. You were previously found in contempt and you will only be purged of that contempt when the examination is conducted.

I have urged the Commission to cooperate with you and it may well be that you can jointly, with the assistance of the marshal, make the requisite telephone calls. I would hope that the examination, weather permitting, can be conducted within the next week and within the next week the Commission can report to me that the matter has been concluded and that they consider that you have purged yourself of contempt.

I will be available and will act on this matter as promptly as possible.

MR. SLOAN: Your Honor, I would just—

THE COURT: Off the record.

(Discussion off the record.)

MR. SLOAN: Your Honor, I just want to make a few brief points. I made these points previously on motion papers submitted to you. I just want to have them on the record today.

I want to point out to the Court that the United States Supreme Court decision, 1974, Taylor v. Hayes, the

Supreme Court established a rule which says that any judge who has been the target of personal abuse or criticism by a litigant is specifically disqualified from sitting on a case. I think you have been on these cases for approximately three years now and although when I come to court I try to conduct myself with as much dignity as possible, I think you read my motion papers and the briefs I filed and so on, you can see you have been the target of criticism of your judicial ability of the kind that wouldn't permit you to proceed.

I ask that you take yourself off this case and it should be assigned to another judge.

Again, I think these motions should be granted and you should not sit on this case. You, in effect, sentenced me to a period of time in confinement.

Regardless of what I do, I offered to give you my mother's telephone number.

THE COURT: Mr. Sloan, let's get something perfectly clear. You have had over one year to furnish these books. Now you would like the Court to do what you should have done. You are the one who must call your mother. You are the one who must make arrangements with your mother and with the Commission.

MR. SLOAN: I already made the arrangements.

THE COURT: Then make it clear to the Commission they can go through during the business day in the reasonably near future and I suggest that once they conducted their examination and report back to me that they have done so, I am in a position where I can see that you purge yourself of your contempt. But you speak of prejudice. You speak of a Court which has not listened to you.

May I suggest that this Court has listened to you in one form or another for a long time.

May I suggest further that when I learned that you were

involved in an accident, I held the motion to have you adjudged in contempt for four months.

May I suggest that when you were in this building before the United States Court of Appeals on the morning of September 26th, you argued in the Court of Appeals where you wanted to be and you chose not to come here.

I suggest that you have shown the most flagrant disregard for the judicial process that is imaginable. And now I would suggest that I am still prepared to release you as promptly as I can if you will undertake to do what must be done, which is to call your mother and make arrangements.

I have told you that the Commission will go forthwith, they will proceed with reasonable diligence and due dispatch to Lynchburg, Virginia, to examine your records and report back to me.

As soon as you have arranged with your mother for the examination and it is conducted and the representatives of the Commission have returned here, I will take up as a priority matter the matter of your release from custody.

MR. SLOAN: I would just like to state for the record that my mother's telephone number is 703-387-1157. She can be reached there almost any time. The Commission can pick up the telephone the minute they walk out of this courtroom and call her. I don't see any reason why I should be punished and held in prison for even an hour or a week in order to get the Commission to do something which they have not attempted to do because as I already told you my mother offered the Securities and Exchange commission her books and they have declined the offer and they won't go down to Virginia.

In addition, the case of Taylor v. Hayes which I described previously does not talk of a judge who has actually be biased, but says when a judge is the target of criticism he must disqualify himself from the case.

The other thing I want to say to your Honor, in view of

the fact I am going into custody, I am not going to be in a position where I am capable of representing myself and I would like the Court to assign counsel because a lot of things have been happening the past few weeks and frankly I am not too clear. I have been reading a lot of judicial decisions, but I am not familiar with anything like this actually happening. I request counsel be assigned to this case.

If I did have flagrant disregard for judicial process, I wouldn't have come back from Iceland. The only reason I came to the Court of Appeals I was confident the Court of Appeals would release me, not that I have particular confidence in this Court.

THE COURT: With reference to your request that you have counsel assigned to this civil matter, you are going to have to demonstrate that you have not sufficient funds for private counsel. You have had private counsel in the past. I note you have traveled from here to Iceland and back and I would suggest that you would have to demonstrate that you do not have the funds to employ counsel.

Once you fill out the requisite forms and they are presented to the Court and I ascertain whether in what is here a civil matter counsel should be assigned to you, I will act on that matter. But it seems to me that in the first instance you cannot just request counsel, but you must demonstrate that counsel should be assigned to you by the Court.

I have given you an opportunity on numerous occasions previously to have counsel. Now, at the end of the proceeding you say you wish counsel. You will prepare the requisite criminal justice act form and it will be processed in the normal course.

If you qualify by virtue of the fact that you do not have the moneys to employ counsel, I will see to it whether or not counsel can be assigned to you either under the criminal justice act or under some other provision.

If you are without assets and there are no other provisions, perhaps the Legal Aid Society would be in a position to afford you representation.

MR. SLOAN: Your Honor, you make reference to the criminal justice act. I would just like to have it clear for the record whether I am held today in criminal or civil contempt of court?

THE COURT: Civil contempt. That is quite clear. Civil contempt. This has been a civil proceeding and it's civil contempt.

When I say the CJA form, I should like to know if you are in a position by virtue of your assets where I could even consider the appointment of counsel. Since it is a civil matter, I have some reservations on that subject, but since you are in custody, I would suggest that I will try to consider the matter in a manner which is most favorable to you. I do not know at this juncture whether you are eligible for the appointment of counsel. So therefore, you are going to have to demonstrate in the first instance your financial inability to afford counsel.

This is a civil case and there is a strong thread in the law which indicates that in civil cases counsel is not given to an individual as a matter of right. But I will still consider it.

***

APPENDIX U—TRANSCRIPT OF PROCEEDINGS OF FEBRUARY 4, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

-vs-

SAMUEL SLOAN

74 CIVIL 5729

4 February, 1976

Before: Hon. ROBERT J. WARD, United States District Judge

Appearances:

For The Plaintiff:

DOUGLAS P. JACOBS, ESQ.

SAMUEL SLOAN
Defendant Pro Se

(Open Court)

THE COURT: Miss Kruger, would you call the matter which was set down for this time?

THE CLERK: S.E.C. versus Samuel Sloan.

THE COURT: The Court notes that Mr. Sloan is present in court having been brought here from the Metropolitan Correctional Center. In addition Douglas P. Jacobs of The Securities and Exchange Commission is here.

Mr. Jacobs.

MR. JACOBS: Thank you, Your Honour. At approximately three-fifteen p.m. this afternoon I received a

Mr. Jacobs, is there anything you wish to say?

MR. JACOBS: Your Honour, with respect to Mr. Sloan's allegations concerning my conduct and the conduct of the Commission I do not believe that either an apology is necessary or any other further comment is necessary, and I would just ask that the record reflect that my lack of comment not be taken to mean acquiescence in Mr. Sloan's allegations.

As to the discontinuance of this lawsuit, I firmly disagree with Mr. Sloan's position. I believe that the lawsuit should be concluded only upon achieving a final permanent injunction in accordance with the complaint that the Commission filed in this action.

Thank you.

THE COURT: Well, I shall not involve myself in any conversation which Mr. Jacobs may have had with your mother, Mr. Sloan. It is a matter that was outside of this court, and I shan't comment upon it. I think that at this time if Mr. Sloan, if you are no longer functioning as a broker-dealer and do not intend to resume that activity, it might be well for you to sit down with representatives of the Commission and perhaps in doing so you could make a mutually agreeable disposition of this litigation.

You have been devoting a substantial amount of time of the last two years I suggest to this litigation, and it would seem to me that if you could devote an equal amount of time and energy to other pursuits you would be benefitted by that.

With reference to your request that we proceed with reference to the discovery matter, which you are correct, I held in abeyance because I did feel that there were certain aspects of your enquiry to which you would be entitled without having focused on exactly which ones and therefore I determined to await the conclusion of this matter, that is, the contempt matter. It has now been concluded. I think it would be appropriate for me to consider the future steps

which will be taken in this litigation should the litigation be continued.

I would first note that I have been given the file in the case which is actually, as I understand it, docketed in The Court of Appeals, and I am looking at the order adjudging Mr. Sloan in contempt of this Court, the order of September 3rd, 1975.

Miss Kruger, I will direct that you prepare an appropriate endorsement on the back of this order which I will now hand you and I am prepared to sign it. I have endorsed the order of civil contempt as follows: "February 4, 1976, five-fifteen p.m., Defendant Samuel H. Sloan having purged himself of contempt by having the relevant books and records produced, he is forthwith released from custody, it is so ordered," and I have signed the order.

Miss Kruger, would you see that that is properly docketed and then returned to The Court of Appeals where this file was taken from.

The Court having signed the order purging Mr. Sloan of contempt I am going to get back to the matter which was raised about the continuation of this lawsuit. I suggest that the parties confer and advise The Court within the next ten days if they are in agreement relative to the termination of this lawsuit. I am not making a suggestion as to how the case is disposed of, but I suggest that it would be well for you to sit down and consider whether or not the case may be resolved by agreement.

If the case cannot be resolved by agreement, I should like someone to advise me of that within ten days, and if you will furnish with your advice a copy of the most recent decision to which Mr. Sloan made reference whereby I ruled on the discovery and granted a stay, the case cannot be disposed of amicably, I will review that matter and then I will address myself to the matter of discovery.

My tentative reaction on that is that there were some items which I felt Mr. Sloan was entitled to. I would

suggest there were probably some that I felt he wasn't entitled to, but it would seem to me from my recollection, which is all I have in front of me now, that there were certain matters in connection with discovery that I felt should be furnished by The Commission should the lawsuit proceed.

Mr. Sloan has made the point that he is no longer a broker-dealer. If he fully intends not to return to the brokerage business it would seem to me a disposition of this matter could be worked out. If he has other plans perhaps the matter could be discussed and still be worked out in one way or another. But, I will leave that to the parties.

The way we will leave this matter is this: Mr. Sloan, you are now free to come and go and go about your business to whatever extent your advised to do so. I suggest I would like to hear from one or both of the parties by letter within ten days indicating either that they are able to dispose of this litigation or that they request particular rulings from The Court. It may be that there are other matters which are in abeyance and have been held in abeyance pending the determination of the present matter, and I am prepared to address myself to any matters which are now open and with which the parties would wish The Court to deal. I shall try to make a disposition of any open matters as promptly as possible.

Is there anything further?

MR. JACOBS: No, Your Honor. Thank you.

THE COURT: Good night.

APPENDIX V—MOTION BY PLAINTIFF FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION
Plaintiff,

-against-

SAMUEL H. SLOAN, Individually and d/b/a SAMUEL H. SLOAN & CO.

Defendants.

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74 Civil 5729 (RJW)

NOTICE OF MOTION

S I R S:

PLEASE TAKE NOTICE that upon the Summons, Complaint, Affidavit of Ralph Pernick dated April 12, 1976, and all papers and exhibits in support thereof, and upon all other prior proceedings in this action, the undersigned will move this court before the Honorable Robert J. Ward in Courtroom 518 of the United States Courthouse, Foley Square, New York, New York 10007, on April 27, 1976, at 2:15 p.m., or as soon thereafter as counsel can be heard, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

PLEASE TAKE FURTHER NOTICE that pursuant to General Rule 9(c)(2) of this court, you are required to serve upon the undersigned all opposing affidavits and answering memoranda at least three days before the return day.

PLEASE TAKE FURTHER NOTICE that pursuant to General Rule 9(g) of this court, (1) papers opposing a motion for summary judgment shall include a separate,

short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried, and (2) all material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

Dated: New York, New York
April 13, 1976

Yours, etc.
s/ William D. Moran by Jeffrey Tucker
WILLIAM D. MORAN
Regional Administrator

Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
26 Federal Plaza
New York, New York 10007
Telephone No.: (212) 264-1636

To:

Samuel H. Sloan
1761 Eastburn Avenue
Bronx, New York

Samuel H. Sloan
c/o 917 Old Trent's Ferry Road
Lynchburg, Virginia 24503

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION
Plaintiff,

-against-

SAMUEL H. SLOAN, Individually and d/b/a SAMUEL H. SLOAN & CO.
Defendants.

74 Civil 5729 (RJW)

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RALPH PERNICK, being duly sworn, deposes and says:

1. I am employed by the United States Securities and Exchange Commission ("Commission") as an attorney in the Commission's New York Regional Office ("NYRO"). This affidavit is submitted in support of the Commission's motion for summary judgment against defendant Samuel H. Sloan ("Sloan"), individually and doing business as Samuel H. Sloan & Co. ("Sloan & Co.").

2. This affidavit is based upon (a) the pre-trial proceedings already held in this action, (b) information contained in documents (1) in the possession of the NYRO and the National Quotation Bureau, Inc., and (2) located at 917 Old Trents Ferry Road, Lynchburg, Virginia, (c) conversations between defendant Sloan and myself, (d) information contained in the transcripts of hearings and oral arguments held in this action on December 30, 1974, January 17, 1975, and February 2 and February 4, 1976, and (e) information contained in court papers filed in this

and other actions[1] between the Commission and defendants Sloan and Sloan & Co.

I

PRELIMINARY STATEMENT

3. On December 30, 1974, the Commission commenced this action by filing a Summons, Complaint, and Order to Show Cause and Temporary Restraining Order ("TRO") against defendants Sloan and Sloan & Co. in the United States District Court for the Southern District of New York, seeking preliminary and permanent injunctions against defendants Sloan and Sloan & Co., enjoining them from further violations of Sections 15(c)(2) and 17(a) of the Securities Exchange Act of 1934, as amended, ("Exchange Act"), 15 U.S.C. 78o(c)(2) and 78q(a), and Rules 15c2-11 and 17a-4 thereunder, 17 C.F.R. 240.15c2-11 and 240.17a-4. The Commission also sought a mandatory injunction requiring the defendants to permit immediate examination of the books and records of Sloan and Sloan & Co. by examiners and other representatives of the Commission. On December 30, 1974, this court issued a TRO which granted the above relief pending determination of the Commission's motion for a preliminary injunction.

4. On January 8, 1975, the Honorable Thomas P. Griesa, United States District Judge, extended the TRO up to and including January 17, 1975.

5. On January 17, 1975, this court held an evidentiary hearing on the Commission's application for a preliminary injunction, and issued an Order of Injunction which (a) enjoined defendants Sloan and Sloan & Co. from further

1. The other actions include (a) *SEC v. Samuel H. Sloan & Co.*, 71 Civil 2695 (RJW), appeal dismissed, Dkt. No. 74-1436 (2d Cir. January 7, 1976); (b) *Sloan v. SEC*, 74 Civil 2792 (TPG), affirmed, slip op. 2377 (2d Cir. March 4, 1976); (c) *Sloan v. SEC*, 527 F. 2d 11 (2d Cir. 1975); (d) *Sloan v. Ward*, Dkt. No. 75-3001 (2d Cir. January 16, 1975); and (e) *Samuel H. Sloan*, Securities Exchange Act Release No. 11376 (April 28, 1975), appeal docketed, *Sloan v. SEC*, Dkt. No. 75-4087 (2d Cir. May 7, 1975).

violating Sections 15(c)(2) and 17(a) of the Exchange Act, and Rules 15c2-11 and 17a-4 thereunder, and (b) ordered defendants Sloan and Sloan & Co. to permit immediate examination of the books and records of Sloan and Sloan & Co., in an easily accessible place, by examiners and other representatives of the Commission.

6. On January 20, 1975, the defendants filed a notice of appeal from the Order of Injunction to the United States Court of Appeals for the Second Circuit, and on January 23, 1975, the defendants filed a motion in the court of appeals to stay the Order of Injunction pending appeal. On February 13, 1975, the court of appeals denied the defendants' motion for a stay.

7. Subsequently, defendant Sloan refused to permit examiners of the Commission to inspect the books and records of defendant Sloan & Co. Accordingly, on March 24, 1975, the Commission filed a motion requesting that this court adjudge defendant Sloan in contempt of the Order of Injunction.

8. Thereafter, on July 22, 1975, this court found defendant Sloan to have wilfully violated the Order of Injunction by refusing to permit inspection of the books and records of Sloan & Co. by representatives of the Commission.

9. On July 28, 1975, defendant Sloan moved for, *inter alia*, reargument of this court's decision of July 22, 1975, and for a hearing and/or jury trial on the motion for contempt. On August 18, 1975, this court denied that motion.

10. On September 3, 1975, this court signed an Order of Civil Contempt ("Contempt Order"). Sentencing on the Contempt Order was scheduled for September 26, 1975, at 2:15 p.m. on September 10, 1975, defendant Sloan filed a notice of appeal from the Contempt Order to the United States Court of Appeals for the Second Circuit, and also filed a motion with the court of appeals to stay the Con-

tempt Order pending appeal. On the morning of September 26, 1975, defendant Sloan appeared before the court of appeals and argued his motion for a stay; the court of appeals denied his motion from the bench.[2] On the afternoon of the same day, however, defendant Sloan failed to appear before this court for sentencing as ordered; accordingly, this court ordered the United States Marshall to arrest Sloan and confine him until he complied with the Contempt Order. However, the United States Marshall was unable to apprehend defendant Sloan, who had apparently fled the jurisdiction.

11. On January 7, 1976, the United States Court of Appeals for the Second Circuit deemed defendant Sloan to be a fugitive from justice; accordingly, the court of appeals dismissed the defendants' appeal from this court's Order of Injunction, which appeal had been scheduled for oral argument on that date.[3]

12. On February 2, 1976, Sloan was apprehended in New York by the United States Marshall,[4] and a hearing on the Contempt Order was held before this court on that day. At

2. Defendant Sloan's application for a stay of the Contempt Order was denied by Mr. Justice Marshall on October 3, 1975.

3. On the same date, the court of appeals also dismissed two other appeals filed by defendant Sloan, as follows: (a) an appeal (Dkt. No. 74-1436) from the Judgment of Permanent Injunction issued by this court on January 18, 1974, in a prior injunctive action against defendants Sloan and Sloan & Co., *SEC v. Samuel H. Sloan & Co., et ano.* (71 Civil 2695); and (b) an appeal (Dkt. No. 75-7046) from an order and opinion issued by the Honorable Lloyd F. MacMahon on October 29, 1974, denying Sloan's motion to intervene in *SEC v. Canadian Javelin Ltd.*, 73 Civil 5074. Judge MacMahon's opinion is reported at 64 F.R.D. 643 (S.D.N.Y. 1974).

No attempt has been made by the defendants to seek review by the Supreme Court of the United States of the dismissal of the appeal from the Order of Injunction, or of the dismissal of the two other appeals referred to in this footnote.

4. Sloan had returned to the United States in order to argue his appeal (Dkt. Nos. 75-7096 and 75-7097) of the dismissal of his complaint in *Sloan v. Canadian Javelin Ltd.*, 73 Civil 4403 and 73 Civil 3801. Oral argument for these appeals for February 2, 1976.

the conclusion of the hearing, the court issued findings of fact and conclusions of law in which it found that defendant Sloan was in contempt of this court for having wilfully violated the court's Order of Injunction, by refusing to permit immediate examination of the books and records of Sloan & Co. by examiners and other representatives of the Commission. The court further found that, although defendant Sloan had been given the opportunity to purge his contempt, he had not done so. Therefore, this court directed that defendant Sloan be confined in the Metropolitan Correctional Center until he permitted an examination of the books and records of Sloan & Co. as ordered. Immediately thereafter, arrangements were made with the custodian of the books and records of Sloan & Co. for such an examination.

13. On February 4, 1976, Commission representatives conducted an examination of the books and records of Sloan & Co., which examination is more fully described below at paragraphs 21-24. On the same day, after being advised that representatives of the Commission had been permitted entry into the house where the books and records of Sloan & Co. were located, and were conducting their examination, this court directed the United States Marshall to release defendant Sloan from custody.

II

SLOAN'S VIOLATIVE CONDUCT

A. Violations of Section 15(c)(2) of the Exchange Act and Rule 15c2-11 Thereunder

14. In December 1974, defendant Sloan submitted to the National Quotation Bureau, Inc. ("NQB"), publishers of the "pink sheets",[5] approximately 300 applications to quote the shares of various companies which were then traded in the over-the-counter market.[6]

15. The forms submitted by defendant Sloan to the NQB do not contain most of the information required by Rule 15c-2-11 to be possessed by broker-dealers submitting applications to quote securities in a "quotation medium".[7] Indeed, the forms submitted for publication by defendant Sloan reveal on their face that defendant does not have the information required by Rule 15c2-11 as a prerequisite to the submission of quotations to a quotation medium.[8]

5. The "pink sheets" contain daily quotations by brokers and dealers as to over-the-counter securities. Most brokers and dealers subscribe to the pink sheets.

6. A copy of a typical application submitted by the defendants to the NQB is attached as Exhibit 1.

7. "Quotation medium" is defined in Rule 15c 2-11(e)(1) as

> any 'interdealer quotation system' or any publication or electronic communications network or other device which is used by brokers or dealers to make known to others their interest in transactions in any security, including offers to buy or sell at a stated price or otherwise, or invitations of offers to buy or sell.

The pink sheets are a quotation medium.

8. Rule 15c2-11 requires that a broker-dealer which publishes a quotation for a security or which, directly or indirectly, submits any such quotation for publication in any quotation medium, either (a) have in his records the most recent annual report of the issuer of such security filed pursuant to Section 13 or 15(d) of the Exchange Act, Rule 15c2-11(a)(3)(ii), or (b) have in his records certain information about the issuer of such security, as prescribed by Rule 15c2-11(a)(4).

B. Violations of Section 17(a) of the Exchange Act and Rule 17a-4 Thereunder

16. On at least three different occasions, described below at paragraphs 17, 18, and 20, defendant Sloan refused to permit representatives of the Commission to inspect the books and records of Sloan & Co.

17. In December 1974, as more fully described in the Affidavit of Thomas F. Dolan, dated December 30, 1974, in Support of Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction, filed in this action, defendant Sloan refused to allow representatives of the Commission to inspect the books and records of Sloan & Co.

18. During February 1975, I telephoned defendant Sloan, as more fully described in the Affidavit of Ira B. Spindler, dated March 24, 1975, in Support of the Commission's Application for Contempt Citation and Response to Defendants' Motion for Injunction Against Harassment, filed in this action. In the course of that telephone conversation, defendant Sloan stated that no time during the following week would be convenient for an examination of the books and records of Sloan & Co. by Commission representatives, and that he was "not particularly inclined to cooperate" with the Commission. Furthermore, defendant Sloan made no offer to make the books and records of Sloan & Co. available for Commission inspection at *any* place or time, and he stated that he would not let examiners of the Commission inspect the books and records of Sloan & Co. Although Sloan was subsequently notified that Commission representatives would go to defendant Sloan's apartment on March 5, 1975, to conduct an examination of the books and records of Sloan & Co., defendant Sloan was not present on that date, and had left no instructions concerning the books and records of Sloan & Co. Thus, once again, Commission representatives were unable to inspect the books and records of Sloan & Co.

19. Accordingly, on March 24, 1975, the Commission filed a motion requesting that defendant Sloan be adjudged in contempt of this court's Order of Injunction. Due to the pendency of the Commission's contempt motion, and due to the fact that defendant Sloan had been injured in an automobile accident in March 1975, the Commission declined to seek an examination of the books and records of Sloan & Co. until the contempt motion was decided and until defendant Sloan's physical condition improved. As described above at paragraphs 8-10, on July 22, 1975, this court found defendant Sloan to have wilfully violated the Order of Injunction, and, on September 3, 1975, the Contempt Order was issued.

20. On September 11, 1975, I telephoned defendant Sloan. In the course of that telephone conversation, I reminded defendant Sloan that he had been adjudged by this court to be in civil contempt, and that this court had given him the opportunity to purge his contempt by permitting an examination as ordered. Once again, defendant Sloan informed me that he would not permit such an examination.

21. On the afternoon of September 26, 1975, defendant Sloan failed to appear for sentencing pursuant to the Contempt Order, as described above at paragraph 10. Because he had fled the jurisdiction, the United States Marshall was unable to apprehend defendant Sloan until February 2, 1976, when he returned to the United States to argue an appeal before the court of appeals.

22. At the conclusion of the hearing held on February 2, 1976, described above at paragraph 12, this court ordered the Commission to send its representatives to Lynchburg, Virginia (where the books and records of Sloan & Co. were located), to examine the books and records of Sloan & Co., and to report back to the court. Accordingly, on February 4, 1976, Alexander Worobec ("Worobec"), a Securities Compliance Examiner in the Commission's New York Regional Office, and I travelled to 917 Old Trent's Ferry

Road, Lynchburg, Virginia—the residence of Dr. Marjorie Sloan (defendant Sloan's mother) — where the books and records of Sloan & Co. were located.

23. Upon arriving at 917 Old Trent's Ferry Road, Worobec and I were admitted by Dr. Sloan to her residence, and she showed us where Sloan & Co.'s books and records were located.

24. Worobec and I examined a ledger which appeared to be a position book in various securities, with each page devoted to a separate security. There were handwritten entries purporting to describe stock transactions by price, and the broker on the opposite side of the transaction. In some instances, the date of the transaction was omitted.

25. In addition, Dr. Sloan showed me to a room in the basement of her house which contained approximately fifty boxes and filing cabinet drawers and, on a table, several piles of computer printouts and ledger books. On the outside of each box was a handwritten notation describing the contents. I examined the contents of approximately ten boxes to verify that the notations accurately described the contents; the notations were accurate. The notations indicated, and my examination verified, that the boxes contained such broker-dealer records as: (a) confirmation tickets; (b) correspondence; (c) a trading ledger; (d) a ledger for fails to deliver and fails to receive; (e) a general ledger; (f) checks, deposit slips, and bank statements; (f) trade tickets; (g) various securities-industry related books, including, but not limited to, the National Bond Summary, Moody's, and the 1973 Stock Market Encyclopedia. The filing cabinets contained three drawers of correspondence with brokers, and five drawers of prospectuses and annual reports for various companies. All of the box notations, computer printouts, and filing cabinets contained documents covering dates or periods in 1971, 1972, or 1973. There were no entries or documents for dates or periods in 1974, 1975, or 1976. No post-1973 reports or prospectuses could be located for those issuers whose

common shares defendant Sloan had submitted applications to quote in the pink sheets during 1974 and 1975.

III
NEED FOR RELIEF

26. In view of the above, it is clear that, despite the formal denials and general allegations of the defendants, no genuine issue as to any material fact exists in this action.

27. It is apparent that defendant Sloan submitted numerous applications to quote securities in the pink sheets without possessing, or knowing, the information concerning the issuers of such securities, as is required of broker-dealers who seek to submit quotations to a quotation medium.

28. The blatant nature of defendant Sloan's violations demonstrates that he is a person who cannot conduct business as a broker-dealer within the law. Defendant Sloan's reckless indifference to his responsibilities to the investing community warrants the issuance of a permanent injunction in order to protect the public interest in the future.

WHEREFORE, plaintiff's motion for summary judgment should be granted.

s/Ralph Pernick
RALPH PERNICK

Sworn to
April 12th, 1976

NATIONAL QUOTATION BUREAU 105a
INCORPORATED

NEW YORK
CHICAGO

SOUTH
SAN FRANCISCO

150 NASSAU STREET
NEW YORK, N. Y. 10038

DEC 20 '

No quotation will be published until the broker-dealer seeking to insert the quotation furnishes the information requested in Parts 1 and 2 below, and if necessary, the information in Part 3, and duly executes and delivers this form.

PART 1

A. Exact name of the issuer and predecessor (if any). NOVA Equity Ventures, Inc.

B. State of incorporation. N.Y.

C. Address of principal executive offices. 295 Madison Ave New York, N.Y.

D. Complete title and class of security to be quoted. Com

E. Par or stated value of security. 1¢

F. Name and address of any transfer agent. Continental Stock Trf Co

G. Number of shares outstanding of the security as of the end of the issuer's most recent fiscal year.

H. Price at which security is to be initially quoted. Bid $ .01 Asked NONE

PART 2

Check the item below which indicates the exemption from Rule 15c2-11 of the Securities Exchange Act of 1934 (the "34 Act") upon which you rely in submitting your quotation.

☐ A. The issuer has filed a registration statement under the Securities Act of 1933 (the "33 Act") which became effective less than 90 calendar days prior to the date hereof, and such registration statement has not been the subject of a stop order which is still in effect, and the undersigned has in its records a copy of the prospectus specified by Section 10(a) of the 33 Act; or

☐ B. The issuer has filed a notification under Regulation A of the 33 Act which became effective less than 40 calendar days prior to the date hereof, and the offering circular provided for under Regulation A has not become the subject of a suspension order which is still in effect, and the undersigned has in his records a copy of such offering circular; or

☐ C. (i) The issuer is required to file reports pursuant to Section 13 or 15d of the 34 Act, or is an issuer of a security covered by Section 12(g) (2) (B) or (G) of the 34 Act; and

(ii) the undersigned has a reasonable basis for believing the issuer is current in filing the reports required to be filed at regular intervals pursuant to Section 13 or 15d of the 34 Act, or, in the case of insurance companies, exempted from Section 12(g) of the 34 Act by subparagraph 12(g) (2) (G) thereof, the annual statement referred to in Section 12(g) (2) (G) (i) of the 34 Act; and

(iii) the undersigned has in his records the issuer's most recent annual report (on Form 10-K) filed pursuant to Section 13 or 15d of the 34 Act, or the annual statement of an insurance company not subject to Section 12(g) of the 34 Act, together with any other reports required to be filed at regular intervals under such provisions of the 34 Act which have been filed by the issuer after such annual report or annual statement; or

☐ D. The security of the issuer on which you are submitting a quotation has been the subject of both bid and asked quotations in an interdealer quotation system at specified prices on each of at least 12 days within the previous 30 calendar days with no more than four business days in succession without such a two-way quotation; or

For ... see ...

BEST COPY AVAILABLE

106a

change (as registered under the 34 Act) and has been traded on such an exchange on the same day as or within business day next preceding, the day the quotation is published or submitted, or

☐ F. The security of the issuer of which you are submitting a quotation is a security of a foreign issuer exempt from Section 12(g) of the 34 Act by reason of compliance with the provisions of Rule 12(g) 3-2(b) thereunder.

☒ G. None of the above.

If you have checked A or B above, supply a copy of the prospectus or offering circular to National Quotation Bureau with this Form 211.

If your answer was "G. None of the above", please supply the information specified in Part 3.

PART 3

A. Describe the nature of products or services offered by the issuer. .. DON'T KNOW

B. Describe the nature and the extent of the issuer's facilities. DON'T KNOW

C. Indicate the name of the Chief Executive officer and members of the Board of Directors of the issuer. DON'T KNOW

D. Attach a copy of the issuer's most recent balance sheet and profit and loss retained earning statement. DON'T HAVE

E. Attach similar financial information for such part of the two preceding fiscal years as the issuer or its predecessor has been in existance. DON'T HAVE

F. State whether the undersigned, or any person associated with the undersigned, is affiliated directly or indirectly with the issuer. NO

G. State whether the quotation is being published or submitted on behalf of any other broker-dealer. If so, state the name of such Broker or dealer. NO

H. State whether the quotation is being submitted or published directly or indirectly on behalf of the issuer or any director, officer or any person, directly or indirectly, the beneficial owner of more than 10% of the outstanding units or shares of any equity security of the issuer. If so, state the name of such person and the basis for any exemption under the Federal securities laws for any sales of such securities on behalf of such person. NO

I certify that I have examined this form and, to the best of my knowledge and belief, it is true, correct and complete. I authorize the NATIONAL QUOTATION BUREAU, INCORPORATED *to furnish a copy of this questionnaire and any or all of the information contained in this form to the Securities and Exchange Commission or any other regulatory body.*

Name of employee to contact regarding information contained herein SAMUEL H. SLOAN Phone (212) 566-8388

Name and Signature of Partner or Officer Samuel H. Sloan

Firm Name SAMUEL H. SLOAN Date DEC. 17, 1974

Address 120 LIBERTY ST. , NEW YORK, N. Y. 10006 Zip No.

APPENDIX "W"
AFFIDAVIT OF SAMUEL H. SLOAN IN OPPOSITION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES & EXCHANGE COMMISSION,

Plaintiff,

-against-

SAMUEL H. SLOAN, Individually
and d/b/a SAMUEL H. SLOAN & CO.,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

Samuel H. Sloan, being duly sworn, deposes and says:

1. I make this affidavit in opposition to the motion of the Securities & Exchange Commission ("S.E.C.") for summary judgment. I believe that the S.E.C.'s motion for summary judgment is without merit and must be denied. The S.E.C. is well aware that there are issues of fact which are strongly contested in this case and its assertion to the contrary is fictitious. In addition, a securities case of this sort is not amenable to summary judgment because the S.E.C. must demonstrate scienter and willfulness (See *Ernst & Ernst v. Hochfelder* ——U.S.——, 44 U.S.L.W. 4451 (decided March 30, 1976)) in addition to proving that the law has been violated, *United Transportation Union v. State Bar of Michigan* 401 U.S. 576, 583 (1971), and it is not likely to be able to do so without a fact hearing.

Moreover, Fed. R. Civ. P. 52(a) and Fed. R. Civ. P. 65(d) require that an order granting or denying an injunction make findings of fact and conclusions of law. It is therefore frivolous to suggest that there are no triable issues of fact in an action such as this where findings of fact are required. Furthermore, the S.E.C.'s claim that a summary judgment of injunction can be entered without a hearing is invalid. In *Granny Goose Foods v. Teamsters* 415 U.S. 423, 439-441 (1974), a decision which overruled many of the cases which the S.E.C. has cited, the Supreme Court made it clear that even a preliminary injunction may not be granted without a hearing. If that were not enough, *Curtis v. Loether* 415 U.S. 189, 191-193 (1974) and *Pernell v. Southall Realty* 415 U.S. 363 (1974) established that in statutory actions for equitable relief such as this one the defendant is entitled to have the facts tried by jury. In this case I have requested a jury trial.

2. It is clear from the record of this case that the S.E.C.'s motion for summary judgment is nothing more than an attempt to deprive me of my Fifth and Sixth Amendment Constitutional rights to cross-examination. See *Greene v. McElroy* 360 U.S. 474, 496 (1959). The moving papers are filled with assertions concerning matters which are unknown and unknowable to me. For example, paragraphs 21-24 of the moving affidavit of Ralph Pernick ("Pernick") describe a trip by Pernick to Virginia and what happened on that occasion. Since I did not accompany Pernick on his trip, I am not in a position to file an affidavit either admitting or denying the truth of what Pernick says in his affidavit. In addition, I believe that his testimony is inadmissible and should be suppressed at trial. I base my claim upon the Fourth and Fifth Amendments to the Constitution of the United States. See *Boyd v. United States* 116 U.S. 616 (1886); *Garrity v. New Jersey* 385 U.S. 493 (1967) and *Spevak v. Klein* 385 U.S. 511 (1967).

3. The rest of Pernick's affidavit is also objectionable for various reasons. The events related in paragraphs 3-6 of

Pernick's affidavit all occurred long before Pernick came to work for the S.E.C. Clearly, Pernick does not have personal knowledge of the events alleged in these paragraphs nor does he pretend to have such knowledge. Paragraph 2 of his affidavit sets forth the source from which Pernick claims he got his information. For example, he says that he bases his affidavit upon "(b) information contained in documents (1) in the possession of the National Quotation Bureau, Inc. . . ." However, I have attempted by discovery to obtain access to any such documents and as yet the S.E.C. has not produced even a single document nor are copies of these documents included in the motion papers. It is clear that Pernick is basing his affidavit primarily upon hearsay which would be inadmissible into evidence at a trial and therefore his affidavit affords no basis for granting a motion for summary judgment. The same is true of the affidavits of Dolan and Spindler to which he refers in paragraphs 17 and 18 of his affidavit. Both the Dolan affidavit and the Spindler affidavit claim to be based upon "correspondence and other documents" and on "information and belief." See Dolan affidavit paragraph 3; Spindler affidavit paragraph 3. In short, none of the affidavits filed by the S.E.C. in this case set forth facts based upon the personal knowledge of the affiant. Since the S.E.C. apparently recognizes that motions for summary judgment are not often appropriate in securities cases, and since all of the affidavits filed by the S.E.C. are based upon information and belief or upon documents which are unavailable either to me or to the courts, it is obvious that the true purpose of the S.E.C.'s motion is to draw me out and to commit me to a detailed statement of the numerous factual misrepresentations contained in the S.E.C.'s moving papers while at the same time leaving the S.E.C. free to change its strategy and to present essentially a different case if this motion is denied. In short, I believe that it is obvious that the S.E.C. cannot under the law prevail on its motion, that the S.E.C. well knows that this is the case and that it is hoping that this court will either

make a mistake in the law and will grant this motion or that the court will deny this motion in such a way as to tell the S.E.C. what elements of proof this court would deem to be sufficient to prevail at a trial. In other words, I believe that the S.E.C. has made an entirely specious motion hoping to gain a strategic advantage and, worse yet, to win a case without a trial under circumstances where it could not prevail at a trial because no person could testify based upon personal knowledge of the facts as asserted by the S.E.C. I do not believe the S.E.C. should be permitted to get away with this. However, I also believe that the allegations which the S.E.C. makes in its Rule 9(g) statement are such that even if proven, which they have not been, they would still not entitle the S.E.C. to relief and therefore this court should decide this motion by entering summary judgment in my favor.

4. I do not believe that it is either necessary or appropriate for me to make a detailed statement of the many things wrong with the S.E.C.'s moving papers since I believe that a number of things which the S.E.C. says are demonstrably untrue. For example, it states in paragraph 12 of its Rule 9(g) statement that "on February 2, 1976, the United States Marshal apprehended defendant Sloan in New York City." Obviously, Pernick has no personal knowledge of this fact, even though he asserts it in paragraph 12 of his affidavit, and indeed it represents a vastly distorted version of the truth. As this court no doubt recalls, on the morning of February 2, 1976 the district judge and I had to wait in the courtroom for nearly an hour before an attorney for the S.E.C. bothered to show up. The S.E.C. has its offices directly across the street from the U.S. Courthouse and, although it was snowing on that day, the courthouse was filled with people and I observed no indication that anyone was having difficulty getting to work that morning. The S.E.C. had been advised of the court date but nevertheless the district judge had to call the New York Regional Administrator of the S.E.C., William D.

Moran, and direct him to send an attorney across the street and even after this was done it was approximately a half hour before anyone showed up. It is obvious to me that the S.E.C. attorneys, for strategic reasons, had decided not to appear in court on that date and changed their minds after receiving a call from the district judge. It appears the S.E.C. then told the district judge as an excuse that two attorneys were coming on the train from Washington, D.C. and that the train had been delayed. If such a statement was made, it was deliberately false. The S.E.C. attorneys do not travel by train; they use the commercial air transportation at government expense. Moreover, I have since been informed that the S.E.C. had not and did not intend to send anyone from Washington, D.C. to appear on that date. In short, the S.E.C. attorneys, following their customary practice, lied to the district judge. Moreover, it is obvious that I was not "apprehended" in the sense implied by the S.E.C. and accordingly on this point alone the proposed findings of fact submitted by the S.E.C. cannot be accepted.

5. Of the sixteen numbered paragraphs in its Rule 9(g) statement, all but paragraphs 1-6 relate to the contempt proceedings which took place after the complaint was filed. Accordingly, I believe that these allegations are irrelevant. Moreover, the S.E.C. has again made untrue statements of material fact and has omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.* The fact is that between September 3, 1975 and September 23, 1975 I called Pernick's office and was told by his secretary that he was not present. He later returned my call and the resulting conversation is apparently one which Pernick refers to in paragraph 20 of his affidavit where he says that a conversation took place on September 11, 1975. However, the words he relates were not uttered by him. The fact is that I and not Pernick was

* See Securities Act, Sec. 17(a)(2), 15 U.S.C. 77q(a)(2).

the aggressor in this conversation and I inquired of Pernick concerning the matter of the contempt. In this conversation, in response to my persistent questioning, Pernick confirmed the fact that the New York Regional office of the S.E.C. had no interest in examining my records and that I should direct my inquiries concerning the matter to Mr. Taylor of the Washington, D.C. office of the S.E.C.

6. In view of the fact that various S.E.C. attorneys have lied to me and to the court on innumerable prior occasions, I took the appropriate precaution of tape recording this telephone conversation with Pernick. There can be no doubt that he has misrepresented what was said in that conversation. I repeat that I did not tell him that I "would not permit such an examination" and the statements made in paragraph 20 of his affidavit are untrue. I also believe that this matter would be appropriately referred to the office of the U.S. Attorney for investigation towards a possible perjury prosecution. There is no doubt in my mind that Pernick has wilfully and deliberately lied under oath or else that he has an extraordinarily poor memory which disqualifies him from testifying at all. I think I should also state that on numerous occasions I have pointed out or attempted to point out to this court the fact that there is documentary evidence which establishes that numerous lies have been told by various S.E.C. attorneys. Nevertheless, this Court has been steadfastly unwilling to listen to or even to entertain my claims. Consequently, as I have said many times previously, I believe that this court is biased and prejudiced in my case and that even if I could prove that beyond reasonable doubt a crime has been committed, this court would not be prepared to take appropriate measures. Accordingly, I repeat my frequently made request that this court recuse itself from this case and direct that further proceedings be conducted before another judge.

7. The moving affidavit of Pernick states that I "apparently fled the jurisdiction" and that I later "returned to the United States." See paragraphs 10, 21. The S.E.C. has

sought to make a great issue over the fact that I went to Iceland and I wish to clarify several points. To begin with, after arguing an appeal in the Court of Appeals on September 26, 1975, I returned to Lynchburg, Virginia where I wrote two briefs so as to perfect two appeals entitled *Sloan v. S.E.C.* 75-7283 and *S.E.C. v. Sloan* 75-6106. It can be observed that these briefs cited 125 and 79 court cases respectively. I think it is obvious that the preparation of these briefs entailed considerable legal research which I could not have done anywhere that I know of outside of the United States simply because the law books would not be available elsewhere. I might mention that during my long period of convalescence after both of my legs were broken when I was struck by an automobile on March 9, 1975, I acquired a library consisting of approximately 150 law books including the Supreme Court Reports, Lawyers Edition, Second Series, the Supreme Court Digest, the United States Code Service, and the American Jurisprudence Proof of Facts, Second Series. During the period of nearly six months that I was bedridden, I spent most of my waking hours reading these law books which proved to be indispensable in writing my briefs. In addition, when I needed to look up Court of Appeals and other federal cases I used the law library in the chambers of United States District Judge James C. Turk in the United States Post Office building in Lynchburg, Virginia. The fact that Judge Turk let me use his personal law library and that I continued to use his law library throughout most of the period during which the S.E.C. now alleges that I had fled the jurisdiction is not surprising since my father had worked in the U.S. Post Office building during most of the nearly twenty years that he worked for the federal government during which time he was a special agent for the Treasury Department and later an auditor for the Internal Revenue Service. As a result, I was a familiar face in the post office building and much of the time which it took me to write my briefs was spent down the hall from the office of the U.S. Attorney in the same building in Lynchburg. All

of this demonstrates that the claim that I "fled the jurisdiction" is untrue.

8. On December 19, 1975, after I had finished writing the second of the two briefs I had been working on, I flew to Miami, Florida and from there to Nassau, Bahamas and from there to Luxembourg and finally to Iceland where I arrived on December 20, 1975.* The S.E.C. would like to have this court believe that I made this trip for the purpose of fleeing the jurisdiction. However, I believe that it should be obvious that this was not the case. As a practical matter it made no difference whether I was in Lynchburg, Virginia or in Iceland so long as I was out of the jurisdictional boundaries of the Southern District of New York and hence out of Judge Ward's Bailiwick. Moreover, the S.E.C. is no doubt aware that for the past three years I have spent New Year's Day in Iceland since this has come up in another court case, see *Sloan v. Canadian Javelin Ltd.* CCH Fed. Sec. Law Rep. Par. 94,579 (1973-74 Transfer Binder) as well as in this case. I have done this, not because the S.E.C. is after me, as the S.E.C. would like to have this court believe, but because, as one can see by consulting books on Icelandic history, New Year's Day revelries were traditional among the Icelandic vikings of as much as one thousand years ago and each year I have found that the Icelandic people more than live up to their tradition and that this more than compensates the effort and expense of getting there. This year, I went to Iceland to visit a personal friend and any pending action by the S.E C. did not play a part in my decision.

9. As far as I khow, from September 26, 1975 until December 19, 1975, when I left the United States, the S.E.C. made no effort to contact me with regard to the contempt matter although I am informed that Thomas L.

* My decision to take the long way around was dictated not by any pending action by the S.E.C. but by the fact that one Hafdis Simonarson, who apparently bears considerable personal animosity towards me, was then, I understand, working for Icelandic Airlines at Kennedy Airport in New York.

Taylor, III ("Taylor") on one occasion, I believe, in October, 1975, called my mother at the hospital in Catawba, Virginia where she works and asked her how to get in touch with me. In about December, 1975 I called Taylor back but he terminated the conversation rather abruptly after we discussed our disagreements concerning what was to be included in the appendix of another appeal, *Sloan v. S.E.C.* 75-4087. The contempt proceeding never came up during that conversation.

10. After arriving in Iceland on December 20, 1975, I went to the U.S. Embassy twice to have the official seal of the United States attached to documents I was filing by mail in the Court of Appeals. Again I believe that this demonstrates that I was not fleeing the jurisdiction in the sense implied by the S.E.C.

11. While I was in Iceland, my mother called Taylor and offered to permit the S.E.C. to inspect my records in her possession in Virginia. As this conversation has been related to me, Mr. Taylor told my mother that the S.E.C. was not interested in coming to Virginia to examine my records, because, among other things, in the past I had sued the S.E.C. for invasion of privacy citing among other things the fact that the S.E.C. had called my mother and had interrogated her concerning my financial affairs. Mr. Taylor told my mother that if she wanted to have the S.E.C. examine my records she would be required to obtain written authorization from me before the S.E.C. would undertake to consider whether they were prepared to conduct the examination.

12. None of these facts, which are undoubtedly well known to the S.E.C. attorneys handling this case, are set forth in the moving affidavit. It can be seen that when I called Pernick he told me that he was no longer handling the matter and that I should call Taylor and that later when my mother called Taylor, he sought to impose on her various preconditions before the S.E.C. was willing to consider whether it would undertake to examine the

records. All of these facts demonstrate that the S.E.C. has misstated what occurred and that it is not entitled to the drastic injunctive relief that it now seeks.

13. The S.E.C. states in its moving papers that on February 2, 1976 the court ordered me "to permit examination by Commission representatives." However, in light of the foregoing a far more significant thing occurred on February 2, 1976 which is that the court ordered the S.E.C. to proceed to Virginia to examine my records. As I have said previously, the S.E.C. had by then known for at least several months how to contact my mother and also knew or should have known that she had possession and control of my financial records. Obviously, the S.E.C. attorneys could not have thought that I took all of my financial records with me to Iceland and if they did think so that they well knew my address and could have contacted me there easily. I should like to point out that this courts order of January 17, 1975 had an ambiguous meaning. Although the order said that the inspection was to be in an "easily accessible place," it did not define the expression "easily accessible." I regard Lynchburg, Virginia or Iceland as being easily accessible but apparently the S.E.C. does not. It has been held in numerous Supreme Court cases that one cannot be punished for disobeying an order which cannot be readily understood. See e.g. *International Longshoremen's Asso. v. Marine Trade Asso.* 389 U.S. 64, 76 (1967). The S.E.C. now wishes to impose an injunction upon me which is punitive and will undoubtedly have adverse collateral consequences for me based upon a claim that I disobeyed an order which, when all the facts are known, it cannot be shown that I disobeyed.

14. However, I believe that even if one deems the S.E.C.'s one sided, biased, distorted and often untrue statement of facts to be true, the S.E.C. is still disentitled to equitable relief. It can be seen from the court records that the S.E.C. obtained on December 30, 1974 a temporary restraining order. Under the law of equity, request

for a temporary restraining order is supposed to indicate that some dire emergency has arisen. Yet, after obtaining the temporary restraining order, the S.E.C. took no action until ten days had passed at which time it obtained ex parte a ten day extention of its temporary restraining order. However, after obtaining this emergency relief, the S.E.C. showed so little interest in the matter that it did not even bother to serve me with the order. For that matter, the subsequent contempt order dated September 3, 1975 was not personally served upon me although the S.E.C. could easily have done so. On January 17, 1975, the S.E.C. obtained a preliminary injunction again claiming that there was an urgent need to see my financial records right away. However, as soon as the court granted the motion and the S.E.C. attorneys left the courtroom, they seemingly forgot about the matter. According to Spindler's affidavit, the first communication I received from the S.E.C. thereafter came on February 26, 1975, or nearly six weeks later. Pernick, it might be mentioned, did not describe this conversation in his affidavit and all this court has before it is Spindler's third rate hearsay concerning what he understands from Nortman that I told Pernick on February 26, 1975. I state unequivocally that I did not state that I would never permit an examination of my records and that Spindler's affidavit to the contrary is untrue. Unfortunately, I did not have the foresight to tape record his telephone conversation.

15. In any event, I believe that it is obvious that even if this court construes the S.E.C.'s complaint liberally and even if it deems every fact alleged by the S.E.C. to be true, this court cannot grant injunctive relief and therefore summary judgment should be entered in my favor. It should be remembered that a motion for summary judgment works two ways and that under circumstances such as this, the court is empowered to grant the plaintiff's motion for summary judgment and then to enter summary judgment in favor of the defendant. Accordingly, I will now

demonstrate that the S.E.C. is not entitled to relief even if the proposed findings of facts set forth in its Rule 9(g) statement were adopted.

16. The S.E.C.'s complaint has two branches. One, which the S.E.C. has generally neglected of late, relates to alleged violations of S.E.C. Rule 15c 2-11, 17 C.F.R. 240.15c 2-11. Paragraph 5 of the S.E.C.'s Rule 9(g) statement sets forth a proposed finding of fact which is not supported by any of the affidavits filed by the S.E.C. In any event, even if this fact were proven, the S.E.C. would not be entitled to relief. In its motion for a preliminary injunction, the S.E.C.'s claim was not that I actually violated Rule 15c 2-11 but only that I said that I intended to do so. See the prior affidavits and testimony of Spindler. In order to prevail at a trial, the S.E.C. here must demonstrate that there is a "real" and "immediate" danger that I will violate the rule. See *Golden v. Zwicker* 394 U.S. 103, 109 (1969). No such showing can be made because the S.E.C. has revoked my broker dealer registration and, as a consequence, the National Quotation Bureau, Inc., which only publishes quotations which are submitted by registered broker dealers, would not publish my quotations if I were to submit them. Therefore, I could not violate Rule 15c 2-11 even if I very much wanted to do so. Accordingly, under the very cases cited by the S.E.C. on page 19 of its brief, I cannot be enjoined from violations of Rule 15c 2-11 because there can be no reasonable expectation of future violations of this rule in the immediate and foreseeable future.

17. In any event, based upon the record here, the S.E.C. is not entitled to summary judgment based upon a violation of Rule 15c 2-11. Without getting into a detailed analysis of what the rule says, it should be sufficient to note that the rule is lengthy and involved and provides for numerous exceptions. The instant case is the first and only court case ever brought to enjoin violations of Rule 15c 2-11. The S.E.C. has not shown what I did and which specific

provision of this rule I violated, nor has it shown that none of the many exceptions apply. Moreover, the supposed evidence submitted by the S.E.C. is palpably insufficient. In addition, Rule 15c 2-11 merely purports to define what constitutes a fraudulent, manipulative and deceptive practice, and in *Ernst & Ernst, supra,* the Supreme Court also defined these words in such a way as to impose a much higher standard of proof than that proffered by the S.E.C. here. It should also be noted that the S.E.C. seeks to have this court expand and broaden the S.E.C.'s own interpretation of its rule. In its release which announced the promulgation of Rule 15c 2-11, Securities Exchange Act Release No. 9310 (see CCH Special Report No. 387, Extra Edition, September 1, 1971) effective December 13, 1971, 36 F.R. 18, 641, the S.E.C. stated that the purpose of the rule was to prevent trading in shell corporations with no business activities. The S.E.C. does not allege here that any of the approximately 300 corporations it says are involved in this case are shell corporations. In my research on the question, I have not been able to find a single administrative adjudication by the S.E.C. of what Rule 15c 2-11 means subsequent to its initial statement dated September 1, 1971. All that can be found in CCH are staff replies to requests for no-action letters and these staff replies are not binding on the S.E.C. itself. Since the action at the bar is the first contested case, either administratively or judicially, involving Rule 15c 2-11, this court must adhere to the S.E.C.'s interpretation of its own rule especially in cases such as this where the determination of the S.E.C. expresses a far more restrictive view of Rule 15c 2-11 than that suggested by the S.E.C. staff here.

18. I should like to point out that in a prior decision reported as *S.E.C. v. Sloan* 369 F. Supp. 996 (S.D.N.Y. 1974), this court held that I had violated Rule 17a-4. However, the S.E.C., based upon the same fact findings, subsequently ruled that I had not violated Rule 17a-4. *Samuel H. Sloan,* Securities Exchange Act Release No.

11376 (April 28, 1975). This court should not again make the mistake of jumping to the conclusion that I violated a particular rule just because a low level S.E.C. attorney claims that this is the case when the views of that attorney may not and in this case certainly do not comport with the views expressed by the Commissioners themselves.

19. This brings this discussion to the question of the alleged violations of Rule 17a-4, 17 C.F.R. 240.17a-4. As has just been noted, the S.E.C.'s interpretation of Rule 17a-4 is not consistant with the views expressed here by the S.E.C.'s staff. The S.E.C.'s own decision states that Rule 17a-4 merely provides that a broker dealer preserve his records. There is no allegation here that this has not been done. The S.E.C.'s brief also states that I violated Section 17(a) of the Exchange Act but then on page 11 it quotes at length not from Section 17(a) but from Section 17(b) of the Exchange Act which is a new section which did not come into effect until June 5, 1975, or more than one month after my broker dealer registration was revoked. The S.E.C.'s brief, page 11, states that Section 17(a) was renumbered as Section 17(b), but this was not the case. Moreover, it is clear from the language of the statute that I did not violate Section 17(a) and the S.E.C.'s argument that I should be enjoined from violating Section 17(a) based upon a proffered showing that I violated Section 17(b) is clearly specious and must fail. In addition the S.E.C.'s argument on page 15 of its brief that my "tortured reading . . . flies in the face of . . . statutory language, legislative history, and case law" cannot be accepted because in *Bouie v. Columbia* 378 U.S. 347, 352 (1964) the Supreme Court held that the Constitution does not permit, either by judicial or administrative adjudication, the broadening of the meaning of a statute as would be understood by persons of common intelligence. Here, it is plainly apparent that Section 17(a) does not either state or imply that I must show my books to the S.E.C.

20. However, putting aside questions of statutory and

administrative construction, it is clear that this court cannot grant the broad sort of permanent injunction the S.E.C. is seeking because to do so would violate my Fourth and Fifth Amendment constitutional rights. The two cases which demonstrate beyond doubt that the S.E.C. cannot prevail here as *See v. City of Seattle* 387 U.S. 541, 543 (1967) and *Boyd v. United States* 116 U.S. 616 (1886). The latter was a landmark Supreme Court decision which involved proceedings in equity similar to the action here. The *Boyd* decision has been followed and discussed in numerous recent Supreme Court cases including *California Bankers Association v. Schultz* 416 U.S. 21 (1974) which dealt with constitutional arguments similar to the ones I am now presenting. I believe that *Boyd* and *See* so clearly demonstrate that the S.E.C. cannot prevail here that a detailed analysis and discussion of those cases and how they apply is not necessary.

21. The S.E.C. makes a specious attempt to defeat my Fourth Amendment claims by citing *S.E.C. v. Olsen* 243 F. Supp. 338 (S.D.N.Y. 1965) (Brief of S.E.C., p. 13). However, the controlling decision is not that one but the Court of Appeals determination of the same case. *S.E.C. v. Olsen* 354 F. 2d 166 (2d Cir. 1965). That decision was based upon an immunity provision contained in the Investment Advisors Act of 1940 which then had its equivalent in Section 21(d) of the Securities Exchange Act, 15 U.S.C. §78u(d). However, on October 15, 1970 Congress repealed Section 21(d) as well as the analogous section in the Investment Advisors Act and there can be no doubt that had it not been for the immunity provision, now repealed, the defendant in Olsen would have prevailed.

Moreover, *Olsen* was based upon the primary authority of *Shapiro v. United States* 335 U.S. 1 (1948), a decision which the S.E.C. does not and could not well cite here. *Shapiro* held that the required records must be reasonably related to a specific purpose and the moving papers of the S.E.C. in this case set forth no specific purpose in desiring

to have the right to examine my records at any time for as long as I live. Moreover, in *Marchetti v. United States* 390 U.S. 39 (1968) and *Grosso v. United States* 390 U.S. 62 (1968), the Supreme Court stopped short of overruling *Shapiro* but severely limited its application in ways which prohibit the S.E.C. from prevailing here. In these two decisions, the Supreme Court held that the "required records" standards only apply in cases where the records serve primarily a civil or administrative purpose as opposed to detecting violations of criminal laws. Since the Exchange Act is, of course, a criminal statute, see Section 32, 15 U.S.C. §78ff, and since it is obvious that the S.E.C. wants to be able to see my records so that it can detect violations by me of criminal laws, it is clear and there can be no doubt that the Fourth and Fifth Amendments to the Constitution prohibit the S.E.C. from obtaining the relief it is seeking and accordingly an order of summary judgment must be entered in my favor.

s/Samuel H. Sloan
SAMUEL H. SLOAN

Sworn to
May 24th, 1976

APPENDIX "X"
OPINION OF COURT OF APPEALS DATED NOVEMBER 18, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 36 and 266—September Term, 1976.

(Argued October 13, 1976 Decided November 18, 1976.)

Docket Nos. 75-4087 and 76-4110

SAMUEL H. SLOAN d/b/a SAMUEL H. SLOAN & Co.,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, RAY GARRETT, JR., PHILIP A. LOOMIS, JR., JOHN R. EVANS, A. A. SOMMER, JR., GEORGE A. FITZSIMMONS,

Respondents.

SAMUEL H. SLOAN,

Petitioner,

v.

SECURITIES & EXCHANGE COMMISSION,

Respondent.

Before:

MEDINA, ANDERSON and GURFEIN,

Circuit Judges.

Petitions for review of S.E.C. order revoking broker-dealer registration and barring petitioner from association with any broker or dealer (Case No. 75-4087), and for review of the validity of a series of S.E.C. orders suspend-

ing trading in the stock of a certain corporation (Case No. 76-4110). S.E.C. orders affirmed in Case No. 75-4087, and declared invalid, except for the first order, in Case No. 76-4110.

SAMUEL H. SLOAN, *Pro Se*, Bronx, New York.

DAVID FERBER, Solicitor to the Commission and FREDERICK B. WADE, Esq., Securities and Exchange Commission, Washington, D. C., *for Respondents.*

ANDERSON, *Circuit Judge:*

Case No. 75-4087

This is the appellant Samuel H. Sloan's latest maneuver in his long struggle to avoid compliance with the Securities and Exchange Act and disciplinary measures brought by the S.E.C.[1] He is now seeking a review of the order of the Commission, dated April 28, 1975, revoking the broker-dealer registration of Samuel H. Sloan d/b/a Samuel H. Sloan & Co., and barring him from associating with any broker or dealer.

He argues, *inter alia*, that his constitutional rights were violated when the SEC refused to let him withdraw his broker-dealer registration as Sloan & Co., which he attempted to do as soon as the SEC took the first steps to revoke the license. As authority for his right to do this he cites *Jones* v. *SEC*, 298 U.S. 1 (1936). But that case dealt with the withdrawal as a matter of right, under the Securities Act of 1933, of a *registration statement* con-

1 A history of Sloan's litigation with the S.E.C. is set out in this court's opinions in *Sloan* v. *SEC*, *slip op.* 2377, 2379, and nn. 2, 3 (2d Cir. March 4, 1976), and *SEC* v. *Sloan*, slip op. 3655, 3656 (2d Cir. May 10, 1976).

cerning *securities*. It had nothing whatever to do with a broker-dealer licensing registration.

The petitioner declares that §15(b) of the Securities Exchange Act of 1934 is a criminal statute, which makes broker-dealers inherently suspect with respect to criminal activities. He, therefore, asserts that a statutory or regulatory provision which requires them to furnish information about activities which have been made criminal under some provision of the Act, in effect, compels them to testify against themselves. He equates his own case with *Leary* v. *United States*, 395 U.S. 6 (1969); and *Marchetti* v. *United States*, 390 U.S. 39, 47 (1968), where respectively (a) disclosure of possession of marihuana or (b) wagering activities for tax purposes exposed the taxpayer to prosecution under state and federal laws. The argument, of course, has no bearing on the present case because the applicable statute with which the case is concerned is not criminal but clearly regulatory in nature. The Supreme Court carefully pointed up this distinction in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79 (1965).

The petitioner also complains that his Fifth Amendment right to notice and a hearing and his Sixth Amendment right to be informed of the nature of the charges against him were violated. It appears from the record that the proceedings by the SEC against Sloan were commenced on April 25, 1972 by mailing to Sloan a three page order for public proceedings. Petitioner does not claim that he did not receive them, and he in fact appeared through his counsel. Although he received notice, he goes on to complain that the order did not give him a sufficiently full or definite statement of the "nature and the cause of the accusations against him." An examination of the Order for Public Proceedings, however, discloses that the allegations against Sloan were made with great particularity and in detail so that he was fully apprised of the claims made

against him; he knew what the nature of the charges was, against which he had to defend himself.

He complains that the order was not signed or verified in accordance with Rule 11, C.R.F.P. and asserts that the S.E.C. was required to have specially pleaded allegations of fraud. But administrative proceedings are not bound to follow the Federal Rules of Civil Procedure.

Among other things the petitioner challenges the constitutionality of the Act itself, as he has done on numerous occasions in other actions. These former attacks[2] were characterized by this court as "frivolous," and we are of the opinion that the present claims are equally so.

The remaining points sought to be raised by the petitioner have no merit and call for no comment. Moreover, prior to the revocation of Sloan's license by the S.E.C., the United States District Court for the Southern District of New York had issued a preliminary injunction, which it subsequently made permanent, ordering Sloan to discontinue his violations of the S.E.C. rules relating to record keeping and net capital. This court dismissed an appeal from the granting of this injunction. *S.E.C.* v. *Sloan*, 538 F.2d 313 (2d Cir. 1976). Thereafter the same district court issued another preliminary injunction on January 17, 1975, prohibiting Sloan from submitting quotations of over-the-counter transactions to "the pink sheets." This court dismissed an appeal from this preliminary injunction on January 7, 1976. *S.E.C.* v. *Sloan*, *supra*. Each of these injunctions was in itself a sufficient ground to support the revocation of Sloan's broker-dealer license under §15(b)5c of the 1934 Act.

The orders of the S.E.C. are affirmed.

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2 See *Sloan* v. *SEC*. slip op. 2377, 2380 (2d Cir. March 4, 1976).

Case No. 76-4110

In an appeal brought by the petitioner Sloan from a series of ten-day suspension orders imposed by the S.E.C. upon the stock of Canadian Javelin, Ltd (CJL), a Canadian corporation, in which Sloan had extensive dealings (principally in selling the stock short), this court handed down a decision on October 15, 1975, *Sloan* v. *Securities & Exchange Commission*, 527 F.2d 11 (2 Cir. 1975), *cert. denied* —— U.S. —— (June 14, 1976), in which it stated that the questions raised were frivolous except for the petitioner's allegation that the "'tacking' of ten-day summary suspension orders by the SEC for an indefinite period constitutes an abuse of that agency's authority and a deprivation of due process. Apparently this question has never been judicially considered and would seem not to be frivolous . . . ." 527 F.2d at 12. The pleadings in the case then on appeal concerned only the first of a series of ten-day suspension orders which ran from November 29, 1973 through January 26, 1975. At the time the appeal was actually heard, however, a second series of ten-day suspension orders was in progress which ran from April 29, 1975 through May 2, 1976. This court was of the opinion that in the absence of any record dealing with this second series of suspensions, it was not in a position to decide whether the second series was based on substantial evidence or if it constituted an abuse of discretion by the S.E.C. Another factor which this court noted was that the applicable statute had been amended on June 4, 1975 and the relevant sections are now §§12(j) and (k) of the 1934 Act, 15 U.S.C. §§78*l*(j) and (k).[3] The amended stat-

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3 Sections 78*l* (j) and (k) read as follows:

"(j) The Commission is authorized by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commis

ute applies to that portion of the second series of ten-day suspension orders issued between June 4, 1975 and May 2, 1976.

In the course of its argument before this court on the prior appeal, the S.E.C., though it did not say that any statute or regulation required it, offered to grant petitioner Sloan "some sort of administrative hearing." The court noted that this would satisfy any possible exhaustion requirement and would at the same time fill out the record which the court found to be "insurmountably sparse." In the light of this development, the court dismissed Sloan's appeal without prejudice to his repleading after an administrative hearing before the SEC from which judicial review might be sought.

This decision was filed on October 15, 1975 and Sloan immediately petitioned the S.E.C. for the promised hearing. The Commission rejected his petition because it was not verified or properly formulated. On March 11, 1976 Sloan filed a new and verified petition to the Commission, demanding the hearing and requesting a declaration that the

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sion finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this chapter or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

(k) If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding ninety days. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended."

successive orders of suspension were illegal, that they violated his due process rights and the Securities Exchange Act. The decision of the Commission rejecting Sloan's petition and refusing to give him the above mentioned administrative hearing was handed down on April 21, 1976, long after the effective date of the amended statute and while the second series of ten-day suspension orders was still being issued. Thereafter on April 23, 1976 and during the time the April 21, 1976 suspension order was operating, Sloan brought the present appeal pursuant to §25(a) of the 1934 Act, 15 U.S.C. §78y(a)(1) (as amended, 1975), for review of this second series of suspension orders. He alleges (1) that there was no rational basis for the trading suspensions and the orders were not supported by substantial evidence; (2) that the suspension orders violated his due process rights because at no time has he been afforded notice and an opportunity for a hearing; (3) that the successive summary suspension orders, the "tacking" of ten-day orders, are unlawful because the statute specifically authorizes summary suspension of trading only "for a period not exceeding ten days"; (4) that §78*l*(k) is an unconstitutional delegation of Congress' legislative power because a suspension of trading in a security is "legislation"; and (5) that the present proceeding is not moot even though there are no suspension orders now in effect.

With respect to the first of these claims, an examination of the record discloses there was sufficient evidence of probable manipulation of CJL's common stock and of the false and fraudulent representations as to its soundness and value to justify the Commission's conclusion that the public interest and the protection of investors required it summarily to suspend trading "for a period not exceeding ten days" in accordance with both the previous sections, 19(a)(4) and 15(c)(5), as well as the new section

12(k), and the Commission, therefore, suspended trading of the stock for ten days commencing April 29, 1975.

At the end of this first ten-day suspension period, the Commission decided that under the circumstances the suspension order should be continued for an additional ten days. It asserts that it did this on the basis of an independent determination made at the time that continued suspension was required in the public interest and for the protection of investors. At the end of the second ten-day suspension period, it made a like determination and ordered a further ten-day suspension and then made another determination and order and another and another until the total suspension periods covered a span of 370 days or 37 ten-day suspension periods. In spite of the wording of the statute, both before and after the amendment of 1975, which authorized suspension "for a period not exceeding ten days," the Commission made its own interpretation of the statute through which it claimed to have the power to order any number of ten-day suspension periods which could total many months or even years. It relies in some measure upon legislative history which concerned the earlier act, i.e., Securities & Exchange Act of 1934, §15(c)(5) and §19(a)(4), 15 U.S.C. §78 o(c)(5) and §78 s(a)(4), to support the legality of such tacking of ten-day orders. Although a few comments by individual senators and congressmen indicated that they were aware that the S.E.C. was using successive ten-day suspension orders for periods of extended duration, no express statutory authority for this procedure was ever enacted. The Commission further claims that the practice of roll-over ten-day suspension orders, which developed before the 1975 amendment, was carried over to the newly amended law of June 4, 1975, because Senate Report No. 94-75, 94th Cong., 1st Sess. (1975), p. 106, stated that the proposed §12(k) "would consolidate in one place the power the SEC presently has

to . . ." issue summary trading suspension orders. We disagree, however, with the Commission's rather free interpretation of the statute and its claims as to the legislative intent.

Section 12(k) of the 1975 amended statute, was a consolidation of the prior sections 15(c)(5) and 19(a)(4). It authorized the SEC to issue summary suspension orders, but it did not empower the Commission to adopt the arbitrary practice of issuing a string of successive ten-day suspension orders such as those promulgated in the present case. More revealing of congressional intent is the paragraph concerning subsection (j) in Senate Report No. 94-75, *supra*, at 105-106, which recites the authority the SEC has "to suspend for a period not exceeding twelve months [n.b. not a summary suspension] . . . after notice and opportunity for hearing . . ." if the Commission finds

> "that the issuer of such security has failed to comply with any provision of the Exchange Act or the rules and regulations thereunder. It would also make unlawful any trading in any such security by any broker or dealer. *With this change, the Commission is expected to use this section rather than its ten-day suspension power in cases of extended duration.*" (Emphasis added.)

This discussion immediately preceded the summary suspension power granted the Commission in subsection (k) and must be read in conjunction with it in determining congressional intent. It must also be borne in mind that the amended statute, as did its predecessor, also provides for an additional summary suspension procedure for a period between the "not exceeding ten day" suspension power and the "not exceeding twelve months" suspension power, and that is, in subsection (k) where the Commis-

sion is authorized "with the approval of the President, summarily to suspend all trading on a national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding *ninety* days." (Emphasis added.) It is clear that the congressional scheme for empowering the SEC to suspend trading in a stock or stocks for specified periods, authorized summary action for ten days and/or ninety days to meet emergency situations, to protect the public interest and afford protection of investors. For suspensions required for periods in excess of ninety days but not in excess of twelve months, a notice and a hearing prior to suspension are required. It was also clearly a part of the congressional scheme that the power to order ten day suspensions was not to be used in cases of extended duration, that is to say they should not be used as a substitute for a period between ten and ninety days or for any time in excess of ninety days, such as in the present case where the suspensions ran on for more than a year.

The petitioner also claims that his constitutional rights were violated by the series of suspension orders because he was never afforded notice and an opportunity for a hearing. It is not necessary to deal with this point as a constitutional violation, however, because the procedures adopted by the SEC plainly transgressed the statutory provisions. For a single ten-day suspension no prior notice or hearing is required because the proceeding is summary in nature and because the emergency aspect of the order, issued to protect the public interest and give protection to investors, makes it necessary. Likewise, a suspension of ninety days or less is a summary proceeding, safeguarded by the prerequisite of presidential approval. The total period of successive suspensions in this case, however, ran for almost eleven months from the effective date of the

amended act, June 4, 1975. Certainly the statute contemplates that for so long a period of ordered suspension in trading of a particular stock, a person aggrieved by the order should be afforded notice and a hearing as soon as it appears that the suspension will probably exceed ninety days.

The only remaining point advanced by the petitioner on appeal, which requires some comment, is the issue of mootness raised by the SEC, which asserts that since May 2, 1976, there has been no ten-day suspension order as to trading of CJL stock, that there are no plans on the part of the SEC to consider or to issue one and no real likelihood that one will be issued in the foreseeable future.

The petitioner claims that he has suffered great loss and damage because the suspension orders frustrated his trade in CJL stock, including short sales, and that each succeeding ten-day suspension expired before he could seek a legal review of the validity of the order.[4] Because of the SEC's continuing policy of roll-over ten-day suspension orders, the harm to him was "capable of repetition yet evading review." *Southern Pacific Terminal Co.* v. *ICC*,

4 This court in its October 15, 1975 decision in Sloan's prior case found that the petitioner had standing, as one aggrieved. At the time he filed his petition in that case he was a trader-dealer doing business under the name of Samuel H. Sloan & Co. He dealt in several different corporate stocks, including the common stock of Canadian Javelin, Ltd., a Canadian corporation. As an individual he owned thirteen shares of Javelin common stock. On April 28, 1975 the S.E.C. revoked his registration and license, so that for the remainder of the time within which this case is concerned, Sloan was not licensed to trade.

We are of the opinion that his private ownership of the common shares is sufficient to confer standing on the petitioner to ask for a review in this case under 15 U.S.C. §78(y) within 60 days of the S.E.C.'s promulgation of its order. *Medical Committee for Human Rights* v. *S.E.C.*, 432 F.2d 659, 667 (D.C. Cir. 1970). The effect of the suspension order on Sloan, an existing shareholder, is equivalent to an injunction preventing him from selling his shares. He, therefore, has standing. We do not pass on whether individual shareholders have standing in other types of SEC proceedings.

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219 U.S. 498 (1911); *Sosna* v. *Iowa*, 419 U.S. 393 (1975). See also *Weinstein* v. *Bradford*, 423 U.S. 147 (1975).

This petition for review was filed before the expiration of the last ten-day suspension of the second series now before us for consideration. Moreover the petitioner had raised the question before this court in connection with its October 15, 1975 decision and again before the SEC in connection with the present case. We declare that the successive roll-over ten-day suspension procedure erroneously adopted by the SEC was improperly pursued and was contrary to the statutory provisions for summary suspensions in force April 30, 1975 to May 2, 1976. The issue of statutory construction and interpretation never became moot and has been ruled upon in this review. The SEC is, therefore, directed to discontinue forthwith its adoption and use of successive ten-day suspension orders to order the suspension of trading in a security for an extended period, i.e. in excess of ten days.

It is so ordered.

480—11-19-76 . USCA—4221

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No. 76-982

Supreme Court, U. S.
FILED
MAR 25 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

SAMUEL H. SLOAN, ETC., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 1a-5a) is reported at 535 F. 2d 679.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1976. A petition for rehearing, and suggestion for rehearing *en banc*, were denied on De-

cember 6, 1976 (Pet. App. 6a-7a). The petition for a writ of certiorari was filed on January 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' challenge to certain orders issued by the district court was mooted by dismissal of the enforcement action in which those orders were entered.

2. Whether the district court abused its discretion in refusing to adjudge "the [Securities and Exchange Commission], its Commissioners, its Secretary and its counsel in contempt of court and to disbar and disqualify counsel for the S.E.C." because of their alleged violation of an order issued by the court.

STATUTES AND REGULATIONS INVOLVED

The general contempt statute, 18 U.S.C. 401, provides as follows:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
> (2) Misbehavior of any of its officers in their official transactions;
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Section 17(a) of the Securities Exchange Act of 1934, 48 Stat. 897, as amended, 15 U.S.C. 78q(a), is set forth incorrectly at Pet. 4-5. That provision, at times relevant to the instant petition, stated as follows:

> (a) Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to section 15 of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books, and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memoranda, papers, books, and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

Pertinent portions of Rule 17a-4, 17 C.F.R. 240. 17a-4 (1975 rev.), are set forth incorrectly at Pet. 5-6. Those provisions, at times relevant to the instant petition, stated as follows:

> (a) Every member, broker and dealer subject to [Section] 240.17a-3 shall preserve for a period of not less than 6 years, the first 2 years in an easily accessible place, all records required to be made pursuant to [Section] 240.17a-3(a)(1), (2), (3), and (5).

(b) Every such member, broker and dealer shall preserve for a period of not less than 3 years, the first 2 years in an easily accessible place:

(1) All records required to be made pursuant to [Section] 240.17a-3(a) (4), (6), (7), (8), (9), and (10).

(2) All check books, bank statements, cancelled checks and cash reconciliations.

(3) All bills receivable or payable (or copies thereof), paid or unpaid, relating to the business of such member, broker or dealer, as such.

(4) Originals of all communications received and copies of all communications sent by such member, broker or dealer (including inter-office memoranda and communications) relating to his business as such.

(5) All trial balances, computations of aggregate indebtedness and net capital (and working papers in connection therewith), financial statements, branch office reconciliations, and internal audit working papers, relating to the business of such member, broker or dealer, as such.

(6) All guarantees of accounts and all powers of attorney and other evidence of the granting of any discretionary authority given in respect of any account, and copies of resolutions empowering an agent to act on behalf of a corporation.

(7) All written agreements (or copies thereof) entered into by such member, broker or dealer relating to his business as such, including agreements with respect to any account.

STATEMENT

This is one of a series of cases arising out of petitioners' failure to comply with various provisions of the federal securities laws. At the time the dispute originally arose, petitioner Samuel H. Sloan & Co. was registered with the Securities and Exchange Commission as a broker-dealer in securities and petitioner Samuel H. Sloan was that firm's sole proprietor (see Pet. 8). On January 7, 1974, following a trial on the merits, the District Court for the Southern District of New York found that petitioners had willfully violated Sections 15(c)(3) and 17(a) of the Securities Exchange Act of 1934, 48 Stat. 895, 897, as amended, 15 U.S.C. 78o(c)(3) and 78q(a),[1] and various rules promulgated thereunder by, *inter alia*, effecting transactions in securities without having the required net capital and failing to maintain, keep current and preserve required books and records.

The court issued a permanent injunction restraining further such violations of the Securities Exchange Act, noting that the injunction was "necessary to protect the public against the continuation or repetition of the above described violations and [that], unless permanently enjoined, there is a likelihood that [petitioners] will continue to engage in violations of the [Securities] Exchange Act and the Rules promulgated thereunder" (*Securities and Exchange Commission* v. *Sloan*, 369 F. Supp. 996, 1001-1002 (S.D.

[1] Sections 15(c)(3) and 17(a) of the Securities Exchange Act of 1934 have since been amended by the Securities Acts Amendments of 1975, Pub. L. 94-29, 89 Stat. 121, 137.

N.Y.), appeal dismissed January 7, 1976, No. 74-1436 (C.A. 2), certiorari denied December 13, 1976, No. 76-365.

Following issuance of the injunction, petitioners refused to permit Commission investigators to inspect the books and records of Samuel H. Sloan & Co. (see Pet. 9-13). On December 30, 1974, the Commission filed suit seeking, *inter alia*, an injunction prohibiting petitioners from removing, destroying or altering their books and records and an order requiring them to permit Commission investigators access to such materials (see *id.* at 13).

On January 17, 1975, the district court issued a preliminary injunction requiring petitioners "to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. * * *, as required by Section 17a of the [Securities] Exchange Act, 15 U.S.C. 78q(a)[,] and Rule 17a-4 promulgated thereunder, 17 C.F.R. 240.17a-4" (Add., *infra*, pp. 2a-3a). The court also ordered petitioners, *inter alia*, "not to remove, destroy or alter the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. required to be made, maintained and preserved pursuant to Section 17a of the [Securities] Exchange Act, 15 U.S.C. 78q(a)[,] and Rules 17a-3 and 17a-4 * * *" (*id.* at 3a).[2]

[2] On January 7, 1976, the court of appeals dismissed petitioners' appeal from the preliminary injunction. *Securities and Exchange Commission* v. *Sloan*, No. 75-7056 (C.A. 2), certiorari denied December 13, 1976, No. 76-365.

Despite the preliminary injunction, petitioner Sloan persisted in his refusal to permit members of the Commission's staff to inspect the books and records of Samuel H. Sloan & Co. (Pet. 16-18, 22-23; Pet. App. 52a). On September 3, 1975, the district court issued an order adjudging Sloan in civil contempt (Pet. App. 51a-53a).[3] The court gave Sloan 20 days to purge himself of the contempt by permitting immediate examination by representatives of the Commission and directed that he appear before the court for sentencing on September 26, 1976, should he fail to purge himself of the contempt by that time (*id.* at 53a).

[3] Although the Commission moved on March 24, 1975, for an order adjudging Sloan in contempt (Pet. App. 52a), the court held that motion in abeyance for several months to permit Sloan to recuperate from injuries he had suffered in an accident (*id.* at 82a). On July 22, 1975, the court filed a memorandum finding that Sloan had willfully violated the preliminary injunction the court had issued on January 17, 1975, by refusing to permit members of the Commission's staff to inspect his books and records (see *id.* at 52a). But the court did not at that time order Sloan's imprisonment or impose a fine. Instead, the court ordered "that Sloan's books and records be removed to a place where they may be inspected by representatives of the Commission as directed in the preliminary injunction" (see Pet. 18).

Contrary to petitioner Sloan's representations (Pet. 22, 37), Sloan did not move on July 22, 1975, for an order transferring the case to the United States District Court for the Western District of Virginia. His motion of that date (Pet. App. 38a-39a) contained no prayer for such relief, although the affidavit he submitted in support of the motion did suggest that such a transfer would be appropriate (*id.* at 45a).

On the morning of September 26, 1975, Sloan appeared before the court of appeals in connection with an application he had filed for a stay of the civil contempt order (Pet. App. 78a). Although the court of appeals denied the application for a stay in his presence, he failed to appear before the district court that afternoon for sentencing (*ibid.*). He subsequently left the United States for Iceland (*id.* at 56a, 76a, 79a).

On February 2, 1976, after returning to the United States on the previous day (Pet. App. 79a), Sloan appeared before the district court and agreed to permit Commission representatives to inspect the books and records of Sloan & Co. at his mother's residence in Lynchburg, Virginia (*id.* at 80a-84a). Pending that inspection, he was remanded to the Metropolitan Correctional Center in New York City (*id.* at 80a, 87a). On February 4, 1976, members of the Commission's staff inspected books and records of Sloan & Co. in Lynchburg (*id.* at 87a-88a). Later that day, Sloan and counsel for the Commission again appeared before the district court and the order of civil contempt was discharged (*ibid.*).

Petitioners thereafter appealed the civil contempt order as well as a number of other orders entered by the district court. The court of appeals held that the civil contempt order was not an appealable final order and that, in any event, the appeal from that order was moot since Sloan already had purged himself of the contempt and had been discharged (Pet. App. 3a). The court also held that three additional

orders were not appealable final orders. These included (1) an order denying petitioners' motion to dismiss the Commission's complaint on various grounds, (2) an order granting the Commission's motion for protective relief against certain interrogatories propounded by petitioners, and (3) an order denying a motion to enjoin the Commission from continued "harassment and annoyance" of petitioners (*id.* at 4a-5a).

The court held further that the district court had not abused its discretion in refusing to adjudge "the S.E.C., its Commissioners, its Secretary and its counsel in contempt of court and to disbar and disqualify counsel for the S.E.C." (see Pet. 21) on the ground that a Commission press release had violated a previous order of the court (Pet. App. 3a). Finally, the court rejected petitioners' contention that the Commission was without authority to prosecute actions on its own behalf (*id.* at 4a).[4]

On August 18, 1976, after the court of appeals had rendered its decision, the district court dismissed the Commission's enforcement action as moot (Add., *infra*, pp. 5a-11a).[5] In so doing, the district court stated that petitioners had engaged in the violations alleged in the Commission's complaint and that sum-

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[4] The court of appeals did not expressly rule upon petitioners' further contention that the district judge before whom the case was pending should have recused himself because of alleged bias against petitioners (see Pet. 22; Pet. App. 82a-84a).

[5] Petitioner Sloan did not appeal dismissal of the action.

mary judgment in favor of the Commission would have been appropriate but for two events occurring after entry of the preliminary injunction: the Commission had revoked the broker-dealer registration of Sloan & Co. and had barred petitioner Sloan from association with any broker or dealer;[6] and the Commission had examined the books and records of Sloan & Co. for the years 1971, 1972 and 1973 and ascertained that there were no records for the years 1974 and 1975.

ARGUMENT

As previously noted, on August 18, 1976—following the court of appeals' decision in this case—the district court dismissed the Commission's enforcement action on the ground that such action had become moot. Specifically, the court noted that on April 28, 1975, the Commission had revoked the broker-dealer registration of Sloan & Co. and on February 4, 1976, the Commission had examined the books and records to which it had been seeking access. The court noted further that in a related case (*Securities and Exchange Commission* v. *Sloan*, 369 F. Supp. 996 (S.D. N.Y.), appeal dismissed January 7, 1976, No. 74-1436 (C.A. 2), certiorari denied December 13, 1976, No. 76-365), petitioners had been permanently enjoined, *inter alia*, from further violations of

[6] On November 18, 1976, the court of appeals affirmed the order revoking the broker-dealer registration of Sloan & Co. and barring Sloan from association with any broker or dealer. *Sloan* v. *Securities and Exchange Commission*, 547 F. 2d 152 (C.A. 2).

Section 17(a) of the Securities Exchange Act, 15 U.S.C. 78q(a), and Rule 17a-4 promulgated thereunder (Add., *infra*, pp. 5a-11a).

Since the underlying enforcement action has been dismissed as moot, there is no reason for this Court to consider the questions raised in the petition. All of the orders with respect to which petitioners seek review by this Court were entered in the enforcement action dismissed on August 18, 1976. All but one of those orders either have been complied with or, because the enforcement action has been dismissed, do not have any continuing effect.[7]

As the court of appeals pointed out, Sloan purged himself of contempt by permitting the Commission to inspect the books and records to which the Commission had requested access. Consequently, "no live controversy remains as to any of the alleged errors in the contempt adjudication * * *" (Pet. App. 3a).[8]

[7] Dismissal of the underlying enforcement action arguably did not moot petitioners' request for the imposition of sanctions against the Commission and others for alleged violation of an order of the court restricting the release of information to the press. But as the court of appeals correctly concluded, "[a]ssuming * * * [the order denying such request] is appealable at all, * * * the district judge found that the particular press release that was the subject of Sloan's motion did not violate his order. We see no basis for substituting our judgment for that of the district judge in interpreting his own order" (Pet. App. 3a). See 18 U.S.C. 401.

[8] Petitioners' challenge to the order adjudging Sloan in contempt proceeds from the mistaken premise that the contempt order was criminal, rather than civil, in nature. According to petitioners, (1) any order of contempt issued by a

The fact that Sloan was adjudged in civil contempt did not result, as petitioners suggest (Pet. 33), in

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district court "must be authorized by a specific statute" (Pet. 31), (2) "the only statute which gives a federal court the power to adjudge a person in civil contempt is 28 U.S.C. § 1826 which deals with 'recalcitrant witnesses'" (*ibid.*), and (3) the court therefore "did not and could not have adjudged Sloan to be in civil contempt * * *" (*id.* at 32). This argument overlooks the fact that the general contempt statute, 18 U.S.C. 401, expressly empowers federal courts "to punish by fine or imprisonment, at its discretion, such contempt of its authority * * * as * * * (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Although the general contempt statute is codified as part of the criminal code, this Court concluded in *Penfield Co.* v. *Securities and Exchange Commission*, 330 U.S. 585, in construing the substantially identical predecessor statute (36 Stat. 1163), that the statute governed "civil as well as criminal contempt proceedings" (330 U.S. at 594). As this Court pointed out in *Penfield*, which involved an order of contempt entered against a defendant for refusing to comply with a subpoena *duces tecum* issued by the Commission, "[i]t is the nature of the relief asked that is determinative of the nature of the proceeding. * * * The relief which the Commission sought was production of the documents; and the only sanction asked was a penalty designed to compel their production. Where a fine or imprisonment imposed on the contemnor is 'intended to be remedial by coercing the defendant to do what he has refused to do,' * * * the remedy is one for civil contempt" (330 U.S. at 590). In the present case, the Commission's request for an order adjudging Sloan in contempt was designed solely to compel him to comply with that portion of the preliminary injunction requiring him to permit members of the Commission's staff to inspect his business records in an easily accessible place (see Pet. App. 53a). As soon as Sloan had permitted such inspection, he was discharged (*id.* at 87a-88a). The court of appeals thus correctly concluded that "[t]he order * * * [was] both in form and in substance an order of civil contempt" (*id.* at 3a).

the summary dismissal of other appeals filed by them. Those appeals were dismissed because Sloan had sought to prosecute the appeals while avoiding—by going to Iceland—the imposition of personal sanctions for his refusal to comply with the court's preliminary injunction.[9]

Dismissal of the underlying enforcement action also means that the district court's orders denying petitioners' motion to dismiss the complaint in that action and granting the Commission's motion for protective relief against certain interrogatories are without continuing effect. Neither is there any reason for this Court to consider whether the district judge should have recused himself or whether the Commission is authorized to prosecute actions on its own behalf. Finally, petitioners' allegation that the enforcement action constituted unwarranted harassment has been mooted by the dismissal of that action. Further review of the court's orders is therefore not warranted. See *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583; *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 284; *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461.

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[9] The circumstances underlying dismissal of the appeals are discussed in the brief in opposition filed on behalf of the Commission in *Samuel H. Sloan, et al.* v. *Securities and Exchange Commission, et al.*, No. 76-365 (certiorari denied December 13, 1976).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

DAVID FERBER,
Solicitor to the Commission,

FREDERICK B. WADE,
Attorney,
Securities and Exchange Commission.

MARCH 1977.

ADDENDUM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civil 5729

[Filed Jan. 20, 1975, U.S. District Court,
S. D. of N.Y.]

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF

—against—

SAMUEL H. SLOAN, Individually and d/b/a
SAMUEL H. SLOAN & CO., DEFENDANTS

ORDER OF INJUNCTION

This matter having come on for a hearing upon an Order to Show Cause issued on December 30, 1974 by this Court and upon the Complaint in this action and the affidavits of Thomas F. Dolan and Ira B. Spindler in support of the application of the Securities and Exchange Commission for an order to show cause and temporary restraining order, mandatory orders, preliminary and permanent injunctions and after hearing counsel for the Securities and Exchange Commission in support of the motion and defendant Samuel H. Sloan, pro se in opposition thereto, and this Court having signed a Temporary Restraining Order on December 30, 1974 and having extended said Temporary Restraining Order on January 8, 1975 and it appearing that unless

the defendant Samuel H. Sloan, individually and doing business as Samuel H. Sloan & Co. are preliminarily enjoined, violations by the defendants of Sections 15(c)(2) and 17(a) of the Securities Exchange Act of 1934 ("Exchange Act"), as amended, 15 U.S.C. 78q(a) and Rules 15c2-11 and 17a-4 promulgated thereunder, 17 C.F.R. 240.15c2-11 and 240.17a-4 and that immediate and irreparable loss and damage will result to members of the investing public and others, it is hereby

ORDERED, ADJUDGED AND DECREED that Samuel H. Sloan and Samuel H. Sloan & Co., their agents, servants, employees, attorneys, successors and assigns, and those persons in active concert or participation with them (or any member or dealer registered with the Commission of which defendant Samuel H. Sloan may become a principal or controlling person), be and they hereby are:

(a) Ordered to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. (or any other broker or dealer registered with the Commission of which Samuel H. Sloan may become a principal or controlling person) as required by Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rule 17a-4

promulgated thereunder, 17 C.F.R. 240.17a-4;

(b) Enjoined from further violations of the examination provisions of Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rule 17a-4 promulgated thereunder, 17 C.F.R. 240.17a-4; and

(c) Ordered not to remove, destroy or alter the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. required to be made, maintained and preserved pursuant to Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rules 17a-3 and 17a-4 promulgated thereunder, 17 C.F.R. 240.17a-3 and 17a-4; and

(d) Enjoined from further violations of the provisions for initiating over-the-counter quotations of Section 15(c)(2) of the Exchange Act, 15 U.S.C. 78o(c)(2) and Rule 15c2-11 promulgated thereunder, 17 C.F.R. 240.15c 2-11, (a full copy of the Rule is attached hereto and made a part of this Order of Injunction), while and at a time said defendants failed to possess, maintain, preserve or make reasonably available upon request to any person expressing an interest in a proposed transaction in the security being quoted, and/or member of the plaintiff Commission's staff those items of information required to be in the possession of a broker-dealer before a broker-dealer may

lawfully publish any such quotation as required by Rule 17 C.F.R. 240.15c2-11(a)(4) and (c).

It is further ordered that this Court shall retain jurisdiction over this matter for all purposes.

Dated: New York, New York
January 17, 1975
Issued at 6 p.m.

/s/ Robert J. Ward
United States District Judge

JUDGMENT ENTERED: 1-20-75

/s/ Raymond F. Burghardt
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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74 Civ. 5729—R.J.W.

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF

—against—

SAMUEL H. SLOAN, Individually and
d/b/a SAMUEL H. SLOAN & CO., DEFENDANTS

Plaintiff Securities and Exchange Commission ("the Commission") moves pursuant to Rule 56, Fed. R. Civ. P., for summary judgment permanently enjoining defendants from further violations of Sections 15(c)(2) and 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78o(c)(2) and 78q(a) ("the Exchange Act"), and Rules 15c2-11 ("Initiating Quotations in Over-the-Counter Securities") and 17a-4 ("Examination and Visitation Provisions") promulgated thereunder, 17 C.F.R. §§ 240.15c2-11 and 240.17a-4. For the reasons hereinafter stated, the motion is denied and the complaint is dismissed as moot.

From May 10, 1970 to April 28, 1975 Samuel H. Sloan ("Sloan") was the sole proprietor and manager of Samuel H. Sloan & Co. ("the Company"), a

broker-dealer registered with the Commission pursuant to the provisions of § 15(b) of the Exchange Act, 15 U.S.C. § 78o(b).

Violations of Section 15(c)(2) of the Exchange Act and Rule 15c2-11 promulgated thereunder.[1]

During the period from on or about December 18, 1974 to on or about March 7, 1975, defendants submitted numerous applications ("Forms 211") to the National Quotation Bureau, Inc. ("NQB") for publication of the quotations contained therein in the NQB's "pink sheets," a medium used by brokers and dealers to quote the shares of various companies which are traded in the over-the-counter market.

[1] At the time this action was commenced, Section 15(c)(2) provided as follows:

> No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation. The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious.

Rule 15c2-11 requires that a broker-dealer which publishes a quotation for a security or which, directly or indirectly, submits any such quotation for publication in any quotation medium, either (a) have in his records the most recent annual report of the issuer of such security filed pursuant to Section 13 or 15(d) of the Exchange Act, Rule 15c2-11(a)(3)(iii), or (b) have in his records certain information about the issuer of such security as prescribed by Rule 15c2-11(a)(4).

The Forms 211 submitted by defendants to the NQB did not include most of the information required by Rule 15c2-11 to be possessed by brokers-dealers submitting such applications.

During the hearing on the Commission's motion for a preliminary injunction and for an order permitting examination of the Company's books and records, defendants did not contend that the Company possessed the requisite information but rather that Section 15(c)(2) of the Exchange Act was unconstitutional and the regulations were in excess of the Commission's authority. On February 4, 1976, following the issuance of an order permitting examination of the Company's books and records, representatives of the Commission conducted an examination and ascertained that defendants did not possess any post-1973 reports or prospectuses for those companies with respect to whose shares they had submitted Forms 211 to the NQB for the publication of quotations in the pink sheets during 1974 and 1975. Although the Commission investigators counted approximately fifty boxes and filing cabinet drawers which contained various broker-dealer books and records covering the years 1971, 1972 and 1973, there were no records for the years 1974 and 1975, a cir-

cumstance which supports the conclusion that defendants violated the foregoing section and rule.

Violations of Section 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder.[2]

All brokers and dealers registered with the Commission are subject to the examination provisions contained in former Section 17(a) of the Exchange Act. Section 17(a), now Section 17(a)(1), and Rule 17a-4 promulgated thereunder, require broker-dealers to make, keep, and preserve books and records and

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[2] At the time this action was commenced, Section 17(a) provided in pertinent part:

> (1) Every national securities exchange, member thereof, broker or dealer who transacts a business in securities through the medium of any such member, registered securities association, registered broker or dealer, registered municipal securities dealer, registered securities information processor, registered transfer agent, and registered clearing agency and the Municipal Securities Rulemaking Board shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter.

Rule 17a-4 requires that a broker-dealer maintain and preserve certain specified records for periods up to six years. The rule further provides that if a person ceases to be registered, "such person shall, for the remainder of the periods of time specified in this section, continue to preserve the records which he theretofore preserved pursuant to this section."

authorize the Commission to inspect a broker-dealer's books and records.

In its complaint the Commission alleges that during the period from on or about December 26, 1974 to the date of the complaint, December 30, 1974, defendants violated Section 17(a) of the Exchange Act and Rule 17a-4 in that they "refused to produce for examination and maintain in an easily accessible place their books and records."

Defendants do not raise any factual issues regarding the alleged violations. Instead they contend that the statute is unconstitutional and the rules promulgated thereunder are in excess of the Commission's authority. However, the Court of Appeals recently rejected defendants' contentions. *Sloan* v. *SEC*, slip op. 2377, at 2380 (2d Cir. Mar. 4, 1976).

Thus, summary judgment would be appropriate and would have been granted plaintiff but for two events which occurred subsequent to the time the complaint was filed and, in this Court's view, have mooted this action. First, on April 28, 1975, the registration of the Company was revoked by the Commission and Sloan was barred from association with any broker or dealer. *Samuel H. Sloan,* Securities Exchange Act Release No. 11376 (Apr. 28, 1975), appeal pending, *Sloan* v. *SEC*, Dkt. No. 75-4087 (2d Cir.) motion for a stay pending appeal denied (2d Cir. Feb. 13, 1976). Second, as noted above, on February 4, 1976 the Commission examined the Com-

pany's books and records for the years 1971, 1972 and 1973 and ascertained that there were no records for the years 1974 and 1975.

Moreover, in *SEC* v. *Sloan*, 369 F.Supp. 996 (S.D. N.Y. 1974), appeal dismissed, Dkt. No. 74-1436 (2d Cir. Jan. 7, 1976), defendants were permanently enjoined from further violations of Section 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder.[3]

As the Supreme Court noted in *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974):

> The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. *See, e.g., Roe* v. *Wade*, 410 U.S. [113] 125 [(1973)]; *SEC* v. *Medical Comm. for Human Rights*, 404 U.S. 403 (1972); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

It might be argued that there is a continuing necessity for injunctive relief here since there is a reasonable expectation of future violations by the defendants. *SEC* v. *Management, Dynamics, Inc.*, 515 F.2d 801 (2d Cir. 1975). However, since the registration of the Company has been revoked and Sloan has been barred from association with any broker or dealer, adequate remedies are available should either of the defendants engage in future violations.

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[3] This permanent injunction remains in force and is unaffected by the dismissal of this action.

Accordingly, plaintiff's motion for summary judgment is denied and the complaint is dismissed as moot. The dismissal is without costs.[4]

It is so ordered.

Dated: August 18, 1976

/s/ Robert J. Ward
U.S.D.J.

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[4] Inasmuch as this determination is not on the merits, the dismissal of this action shall not serve as a bar should a need for relief arise hereafter.

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